Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PHILLIP KELLEY BOBO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Court of Appeals has the jurisdiction and authority in deciding an interlocutory appeal by the Government under Section 3731 of Title 18, United States Code, to order that the case be re-assigned to another District Judge after remand.

2. Whether Section 137 of Title 28, United States Code, operates to deny jurisdiction and authority to a Court of Appeals to order a case re-assigned to a different District Judge on remand after deciding an interlocutory appeal under Section 3731 of Title 18, United States Code.

3. Whether Section 2106 of Title 28, United States Code authorizes a Court of Appeals to order a case re-assigned to a different District Judge following remand after deciding an interlocutory appeal under Section 3731 of Title 18, United States Code in the absence of a statutory ground for recusal or disqualification of the District Judge whose order was appealed.

PARTIES TO THE PROCEEDING

No party in addition to the parties named in the caption was a party to the proceeding in the United States Court of Appeals for the Eleventh Circuit which this petition seeks to review. No corporation has an interest in this proceeding.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINION BELOW	1
BASIS FOR JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	9
Issue 1	11
Issue 2	17
Issue 3	20
CONCLUSION	28
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

STATUTES

U.S. CONST. Art. III, §1 10

18 U.S.C. §3731 ..... *passim*

28 U.S.C. §137 ..... 4, 17, 18, 20, 28

28 U.S.C. §144 ..... 4, 21, 28

28 U.S.C. §455 ..... *passim*

28 U.S.C. §455(a) 24, 25, 27

28 U.S.C. §455(b) 24

28 U.S.C. §455(b)(1) 24

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 ..... 3, 15, 17

28 U.S.C. §1292 ..... 3, 15

28 U.S.C. §2106 ..... 5, 20, 21, 22, 29

31 Stat. 1246, ch. 2564 (1907) 11

Omnibus Crime Control Act of 1970 12

Sup.Ct.R. 10(a) 16, 29

Sup.Ct.R. 10(c) 16, 19, 28

CASES

Arcadia v. Ohio Power Co., 498 U.S. 73 (1990) 18

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 10

Armstrong v. Manzo, 380 U.S. 545 (1965) 16

TABLE OF AUTHORITIES – Continued

Page

Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) 17

Bercheny v. Johnson, 633 F.2d 473 (6th Cir. 1980) 23

Carroll v. United States, 354 U.S. 394 (1957) 11

Chambers v. NASCO, Inc., 501 U.S. 32 (1991) 15

Chase Manhattan Bank v. South Acres Development Co., 434 U.S. 236 (1978) 10

Cheney v. United States District Court, 541 U.S. 913 (2004) 26

Cupp v. Naughten, 414 U.S. 141 (1973) 17, 21, 28

Di Bella v. United States, 369 U.S. 121 (1962) 12

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 15

Hanna v. Plumer, 380 U.S. 460 (1965) 10, 15

In Re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir. 1980) 13, 14

In Re DaimlerChrysler Corp., 294 F.3d 697 (5th Cir. 2002) 23

Keene Corporation v. United States, 508 U.S. 200 (1993) 10

Liddell v. Board of Ed. of City of St. Louis, 677 F.2d 626 (8th Cir. 1982) 13, 14

Liteky v. United States, 510 U.S. 540 (1994) 24, 25, 27

Nelson v. Adams, Inc., 529 U.S. 460 (2000) 16

Palmore v. United States, 411 U.S. 389 (1973) 10

Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988) 21

TABLE OF AUTHORITIES – Continued

Page

Proctor & Gamble Co. v. Haugen, 427 F.3d 727 (10th Cir. 2005) 23

Rumsfeld v. Padilla, 542 U.S. 426 (2004) 15

Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co. Inc., 535 U.S. 229 (2002) 26

SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977) 14

Scarrella v. Midwest Federal Savings and Loan, 536 F.2d 1207 (8th Cir. 1976) 14

Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988) 10

Thomas v. Arn, 474 U.S. 140 (1985) 17

United States v. Bobo, 344 F.3d 1076 (11th Cir. 2003) 5

United States v. Borden Co., 308 U.S. 188 (1939) 12

United States v. Dickinson, 213 U.S. 92 (1909) 12, 14

United States v . DiFrancesco, 449 U.S. 117 (1980) 12, 13

United States v. Gregory, 656 F.2d 1132 (5th Cir. 1981) 14

United States v. Hasting, 461 U.S. 499 (1983) 17

United States v. Keitel, 211 U.S. 370 (1908) 12

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 11, 12

United States v. Mersky, 361 U.S. 431 (1960) 11

United States v. Microsoft Corp., 56 F.3d 1448 (DC Cir. 1995) 22, 23

TABLE OF AUTHORITIES – Continued

Page

United States v. Ming He, 94 F.3d 782 (2nd Cir. 1996) 23

United States v. North Carolina, 180 F.3d 574 (4th Cir. 1999) 23

United States v. Payner, 447 U.S. 727 (1980) 17

United States v. Petrillo, 332 U.S. 1 (1947) 12

United States v. Sanges, 144 U.S. 310 (1892) 11

United States v. Schooner Peggy, 1 Cranch 103 (1801) 20

United States v. Scott, 437 U.S. 82 (1978) 11

United States v. Sidener, 876 F.2d 1334 (7th Cir. 1989) 13, 14

United States v. Sisson, 399 U.S. 267 (1970) 11

United States v. Torkington, 874 F.2d 1441 (11th Cir. 1989) 23

Vuono v. United States, 441 F.2d 271 (4th Cir. 1971) 13

Wyler Summit Partnership v. Turner Broadcasting System, Inc., 235 F.3d 1184 (9th Cir. 2000) 23

PETITION FOR WRIT OF CERTIORARI

Petitioner, Phillip Kelley Bobo, prays that a writ of certiorari issue to review that portion of the judgment of the United States Court of Appeals for the Eleventh Circuit entered on June 23, 2006 in an interlocutory appeal by the Respondent United States under Section 3731 of Title 18, United States Code, which ordered that upon remand to the District Court the pending prosecution against Petitioner be re-assigned to a different District Judge.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit which this petition seeks to review was rendered on June 23, 2006 and is reprinted in the Appendix hereto at pages App. 1-5. This decision was not officially reported.

BASIS FOR JURISDICTION

Petitioner was indicted in the United States District Court for the Northern District of Alabama on May 27, 2004 for several offenses (violations of Sections 371, 1347, 666, 1343, 1512, 1001 and 1623 of Title 18, United States Code) allegedly arising out of a bidding process for medical services contracts to be awarded by the State of Alabama Medicaid Agency which were to be paid for in part by federal funds. The District Court granted a pre-trial motion in limine filed by Petitioner requesting that evidence and argument not be permitted at Petitioner's trial that the Alabama Competitive Bid Law required contracts

for medical services with the State or its agencies be awarded by competitive bidding (App. 72-74). The Respondent United States took an interlocutory appeal from this order to the United States Court of Appeals for the Eleventh Circuit pursuant to Section 3731 of Title 18, United States Code (App. 75-77). On June 23, 2006 the Eleventh Circuit affirmed the order of the District Court granting the motion in limine, but in its judgment ordered that upon remand the case be re-assigned to a different District Judge (App. 1-5). Petitioner's timely filed petition for rehearing and rehearing en banc challenging the re-assignment order was denied on September 1, 2006 (App. 7-8).

The jurisdiction of this Court is invoked pursuant to Section 1254(1) of Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following statutory provisions:

1. Section 3731 of Title 18, United States Code:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or

requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted. The provisions of this section shall be liberally construed to effectuate its purposes.

2. Section 1291 of Title 28, United States Code:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

3. Section 137 of Title 28, United States Code:

> The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.
>
> The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.
>
> If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

4. Section 144 of Title 28, United States Code:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

5. Section 455 of Title 28, United States Code, which is copied in the Appendix to this petition (App. 9-12).

6. Section 2106 of Title 28, United States Code:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

On April 27, 2001 Petitioner was indicted in the United States District Court for the Northern District of Alabama for allegedly violating Sections 371 and 1347(1) of Title 18, United States Code, in connection with a bidding process for an award of medical services contracts from the State of Alabama Medicaid Agency which were to be financed in part by federal funds. Following a conviction in that case Petitioner appealed to the United States Circuit Court of Appeals for the Eleventh Circuit which reversed his conviction, finding the indictment returned against him to be defective, in a decision reported as *United States v. Bobo*, 344 F.3d 1076 (11th Cir. 2003). The District Judge who presided in that case is now deceased.

On May 27, 2004 Petitioner was re-indicted in the Northern District of Alabama for the same or similar charges as those made in the 2001 indictment. The 2004 indictment named two additional defendants, Don Eugene Siegelman and Paul Michael Hamrick. This case was randomly assigned to Chief District Judge U.W. Clemon.

On August 16, 2004 the Government filed a motion for Judge Clemon to recuse himself from this case, citing a connection between the Judge's daughter and a law firm with close ties to Defendant Siegelman, a general bias against the Government, and financial ties to the lawyer for an unindicted co-conspirator and witness. The motion was denied on August 30, 2004 (App. 13-40). The Government filed a petition for writ of mandamus in the Eleventh Circuit to review the denial of the recusal motion (App. 41-67). The Eleventh Circuit denied the Government's petition for writ of mandamus on September 29, 2004 (App. 68).

The prosecution of Siegelman and Hamrick was severed from the prosecution of Petitioner on September 21, 2004 (App. 69-70). Following the severance the District Court conducted a number of pre-trial hearings in the Siegelman-Hamrick case in which Petitioner and his counsel did not participate (App. 107-204). These included a hearing on October 4, 2004 (App. 107-08). The Siegelman-Hamrick case proceeded to trial on October 4, 2004. After adverse evidentiary rulings the Government moved to dismiss the Siegelman-Hamrick case and the motion was granted on October 5, 2004, and confirmed by written order entered October 15, 2004 (App. 71).

Petitioner filed a pretrial motion in limine to bar the admission of evidence at his trial that competitive bidding for medical services contracts was required by Alabama law. Petitioner's motion was granted on November 10, 2005 (App. 72-74). On November 14, 2005 the Government appealed this order, under the authority of Section 3731 of Title 18, United States Code, to the Eleventh Circuit (App. 75-77). The notice of appeal averred that the appeal was from an order "excluding evidence" (App. 75).

The Government designated for inclusion in the appeal record for its Section 3731 appeal taken on November 14, 2005, *inter alia*, transcripts and records from Petitioner's trial on the 2001 indictment and transcripts and records of hearings in the severed Siegelman-Hamrick prosecution. Petitioner objected to the inclusion of these materials in the appeal record by filing with the Eleventh Circuit objections and a motion to strike or amend the appeal record on the grounds that the sole issue in the Section 3731 appeal was the validity of the November 10, 2005 order in limine. On January 27, 2006 the Eleventh Circuit ordered the Government to show cause why the certificate of readiness in the Section 3731 appeal should not be amended to eliminate from the appeal record the post-severance proceedings in the Siegelman-Hamrick case and records of Petitioner's first trial (App. 78-79). On March 7, 2006, following the Government's response asserting that these records were needed on the issue of the recusal of Judge Clemon, the Eleventh Circuit entered an order which read, in part:

> Appellant's [Government's] request to reassign this case to a different district judge is outside the scope of this interlocutory appeal and is therefore DENIED. (App. 81).

On June 23, 2006 the Eleventh Circuit affirmed the November 10, 2005 order of the District Court (App. 1-5). In its June 23, 2006 decision the Eleventh Circuit disavowed its March 7, 2006 finding that the Government's re-assignment request was outside the scope of the Section 3731 interlocutory appeal and ordered that upon remand the prosecution against Petitioner be re-assigned to a different District Judge (App. 5). The June 23, 2006

decision made no finding of a statutory ground for recusal or disqualification (App. 5)

The order appealed to the Eleventh Circuit which was the subject of the June 23, 2006 decision was concerned only with Petitioner's motion in limine (App. 72-74). However, in its brief filed in the Eleventh Circuit (Appellant's brief) on its Section 3731 appeal the Government included in its Statement of Issues, as Issue 2, the following:

> 2. Should this case be reassigned to a different district judge on remand due to the current district court's conduct in the proceedings to this point? (App. 83)

In the Argument portion of its brief the Government devoted 22 of its 32 pages of argument to the recusal issue (App. 83-106). The Government's recusal argument was not based on any ruling in the order appealed from or on any pleading filed in the District Court or in the Eleventh Circuit.

Prior to the Government's appeal on November 18, 2005 the Eleventh Circuit had already rejected, on the merits, efforts by the Government to have Judge Clemon recused from Petitioner's case (App. 68). After the Eleventh Circuit, on September 29, 2004, rejected the Government's mandamus petition seeking recusal or disqualification the Government filed no further recusal or disqualification motions in the District Court.

The occurrences and proceedings related to recusal the Government complained of in its Eleventh Circuit brief (App. 91-93) took place in a hearing in the Siegelman-Hamrick case on October 4, 2004 (App. 107-204), after

Petitioner's case had been severed (App. 69-70). The June 23, 2006 opinion said:

> Although the trial judge's involvement in the Siegelman-Hamrick proceedings does not rise to the level of actual bias, certain aspects of his participation, *such as sustaining objections where Bobo's attorney apparently failed to raise any*, might "give rise to the appearance of . . . a lack of impartiality in the mind of a reasonable member of the public." (June 23, 2006 opinion, pages 5-6); (App. 5). (Emphasis added)

This is the only reference in the opinion to any conduct of Judge Clemon related to Petitioner. The record of the October 4, 2004 hearing referred to by the quoted portion of the opinion shows that Petitioner and his attorney did not participate in that hearing (App. 107-08).

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's June 23, 2006 decision was in an interlocutory appeal under Section 3731 of Title 18, United States Code, from an order granting a motion in limine. The order did not concern recusal or disqualification. The June 23, 2006 decision of the Eleventh Circuit affirmed the order the Government had appealed from granting the motion in limine.

Inherent in the Eleventh Circuit's June 23, 2006 order that Petitioner's case be re-assigned after remand is the assumption and assertion by the Eleventh Circuit of jurisdiction to enter the order and a determination of a valid legal and factual basis authorizing and justifying its entry. The position of this petition is that there was

neither subject matter jurisdiction nor a legal and factual justification for entry of this order.

At the outset of a discussion of the issues raised by this petition it is appropriate to first notice several established and pertinent principles regarding Federal Courts that are applicable to all issues raised. Courts of Appeals are "inferior courts" under Article III of the Constitution and are courts of limited jurisdiction. See *Chase Manhattan Bank v. South Acres Development Co.*, 434 U.S. 236, 239-40 (1978). Courts of Appeals were created by and their jurisdiction, power, and authority defined by Congress. See *Keene Corporation v. United States*, 508 U.S. 200, 207 (1993); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433 (1989); *Palmore v. United States*, 411 U.S. 389, 400-01 (1973). Where Congress has created an inferior court it does not necessarily vest it with all the powers Congress is constitutionally able to confer. See *Palmore v. United States, supra*. The constitutional provision for a Federal Court System carries with it Congressional power to make rules governing the practice and pleading in Federal Courts and includes the power to regulate matters of substance or procedure. See *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988); *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

It is also appropriate at the outset to take notice of a factual reality that is very relevant to this case. An order from an appellate court directing that a case remanded to a trial court be re-assigned after remand to a different trial judge is a forced recusal or disqualification of the trial judge and is no different or less compulsory and demeaning to the trial judge than a recusal or disqualification order that arises through the usual adversary process.

Issue 1

A Court of Appeals has no jurisdiction in an appeal brought by the Government pursuant to Section 3731 of Title 18, United States Code, to order the case re-assigned to a different District Judge after remand.

Following the general consensus as to the common law rule in the United States, coupled with the knowledge that Congress had declared no such right, this Court held in *United States v. Sanges*, 144 U.S. 310, 323 (1892) (and other cases) that the Government has no right of appeal in criminal cases. This status remained until 1907 when Congress granted the Government a limited right to appeal in criminal cases. See 31 Stat. 1246, ch. 2564 (1907). This limited appeal statute has been amended several times, and is now codified as Section 3731 of Title 18, United States Code.

Historically, the grant of this limited appeal right has not been given an expansive construction by this Court. In *Carroll v. United States*, 354 U.S. 394, 400 (1957) it was declared that in Federal jurisprudence appeals by the Government in criminal cases are "unusual, exceptional, and not favored". The authorization for Government appeals has been strictly construed against the Government's right to appeal. See *United States v. Sisson*, 399 U.S. 267, 286 (1970); *United States v. Mersky*, 361 U.S. 431, 437 (1960). The Government's right to appeal has been limited strictly to the instances specified by statute. See *United States v. Scott*, 437 U.S. 82, 84-85 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977); *United States v. Mersky*, *supra*.

The Omnibus Crime Control Act of 1970 perhaps changed some of the strict construction gloss of some of the earlier cases. However, the 1970 Act could have had no effect on the decisions which limit the Government's right to appeal to the specific instances stated in the statute. This is true because these are jurisdictional limits which Congress has imposed and which Congress alone has the power to define. See *United States v. DiFrancesco*, 449 U.S. 117, 131 (1980); *United States v. Martin Linen Supply Co., supra*; *Di Bella v. United States*, 369 U.S. 121, 130 (1962).

Earlier decisions of this Court construing the predecessors of Section 3731 have explained in more detail its constraints on the subject matter of Section 3731 appeals. *United States v. Dickinson*, 213 U.S. 92, 102-03 (1909) held that the appeal right is limited to a re-examination of the "particular decisions" described in the statute. *United States v. Keitel*, 211 U.S. 370, 398 (1908) was more explicit, saying that the 1907 Act (which then provided for appeals directly to the Supreme Court):

> . . . contemplates vesting this Court *with jurisdiction only to review the particular question decided by the court below* for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court *concerning the subjects embraced within the clauses of the statute, and not to open here the whole case.* (Emphasis added)

See also *United States v. Petrillo*, 332 U.S. 1, 5, (1947); *United States v. Borden Co.*, 308 U.S. 188, 194 (1939). The cited decisions describing the limits on appealable subject

matter are not affected by the 1970 Act and remain controlling precedents. See *United States v. DiFrancesco, supra.*

This case involves the second sentence of Section 3731, orders "excluding evidence". That was the basis cited in the Government's notice of appeal (App. 75). Section 3731 gives no right to appeal orders denying recusal or disqualification of District Judges. Neither does it give the Government the right to "piggy back" other issues onto an authorized appeal. Therefore, the Government's appeal in this case could have no effect beyond invoking a review of the order granting the motion in limine.

The Government's Section 3731 appeal could not include or create jurisdiction for a review of recusal or disqualification issues. The Eleventh Circuit (acting in defiance of its March 7, 2006 order which recognized its obvious lack of jurisdiction [App. 80-81]) plainly had no jurisdiction given by Congress to consider recusal or disqualification issues, and had no jurisdiction to order reassignment after remand.

The Government's attempt, validated by the Eleventh Circuit's decision, to "shoe horn" a recusal or disqualification issue into the Section 3731 appeal is unwarranted for another pertinent reason. Recusal or disqualification orders are not reviewable by interlocutory appeal. The Courts of Appeals are fairly uniform in holding that while rulings on recusal motions may be reviewable on appeal from a final judgment (primarily applicable to civil cases) they are not separately reviewable by interlocutory appeal. See, e.g., *Vuono v. United States*, 441 F.2d 271, 272 (4th Cir. 1971); *In Re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 960 (5th Cir. 1980); *United States v. Sidener*, 876 F.2d 1334, 1336 (7th Cir. 1989); *Liddell v.*

Board of Ed. of City of St. Louis, 677 F.2d 626, 643 (8th Cir. 1982); *Scarrella v. Midwest Federal Savings and Loan*, 536 F.2d 1207, 1210 (8th Cir. 1976). The Courts of Appeals are also fairly uniform in holding that Government review of recusal orders in criminal cases must be by mandamus. See *United States v. Gregory*, 656 F.2d 1132, 1136 (5th Cir. 1981); *In Re Corrugated Container Antitrust Litigation*, *supra*; *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117-18 (7th Cir. 1977); *United States v. Sidener*, *supra*; *Liddell v. Board of Ed. of City of St. Louis*, *supra*.

In this case the Government had earlier attempted to compel the recusal of Judge Clemon by a motion addressed to him and, following its denial, a petition for mandamus. The Eleventh Circuit denied mandamus on September 29, 2004 (App. 68). The Government took no further action in the District Court to seek the recusal of Judge Clemon after the September 29, 2004 denial of mandamus. It did not address a recusal motion alleging new grounds to Judge Clemon (or file an affidavit under Section 144), so obviously had no colorable basis for seeking to compel recusal by mandamus (or appeal) at the time of its appeal on November 10, 2005.

Instead of following the regular course of seeking recusal based on Section 455 (or Section 144) of Title 28 by filing a motion or affidavit with the District Court the Government disingenuously sought a second bite at the apple at the appellate level and attempted an end run around Section 3731 and the general prohibition against interlocutory appeals by adding an impertinent issue to its brief in its Section 3731 appeal of the order in limine (App. 83). The Government undertook – contrary to the teachings of *United States v. Dickinson*, *supra*, – to "open here the whole case" in its Section 3731 appeal. The June 23,

2006 decision of the Eleventh Circuit, after disavowing its correct March 7, 2006 decision, sanctioned this end run and the opening of "whole case" by its extra-jurisdictional re-assignment order.

In addition to exceeding its limited jurisdiction on a Section 3731 appeal, the Eleventh Circuit's decision allowing the Government to obtain a recusal by merely extraneously arguing that issue in a brief produces two other disruptive and pernicious consequences:

(1). If a party can create an issue for a Court of Appeals to decide by merely arguing it in a brief a party can create an appeal issue never litigated and decided in the District Court. This violates the basic concept that Courts of Appeals have only jurisdiction of appeals from "decisions" or "orders" of District Courts where issues have been litigated and decided. See 28 U.S.C. §§1291, 1292. No recusal issue such as that argued by the Government in its brief in this case had ever been presented to and decided in the District Court.

(2). If this "back door" remedial proceeding is available by merely inserting an extraneous argument in a brief it becomes a vehicle and a license for forum shopping in any interlocutory appeal. Forum shopping is inimical to the policy and philosophy of this Court and the Congress. This Court has recognized that one of the aims of the landmark decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) was the discouragement of forum shopping. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 53 (1991); *Hanna v. Plumer*, 380 U.S. 460, 467, 468 (1965). Congress has usually framed legislation in a way to prevent forum shopping. See, e.g., *Rumsfeld v. Padilla*, 542 U.S. 426, 447 (2004).

A further flaw in the "insert in appeal brief" stealth tactic the Government employed in this case is its infringement on due process of law. A basic tenet of due process is the right to be heard and to dispute the contentions of an adversary. See *Nelson v. Adams, Inc.*, 529 U.S. 460, 471 (2000); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Asserting its recusal claim only in the appellate court, which has no original jurisdiction, as the Government did in this case, denied an opportunity to present evidence and contest the assertion in a trial court – not an appellate court – where evidence can be presented and facts developed. To permit this procedure would be a flagrant denial of the right to be heard.

The writ of certiorari should be granted in this case as to this issue for the following reasons:

(1). Re-assigning Petitioner's case and ruling on a judicial recusal or disqualification issue in a Section 3731 appeal where no jurisdiction exists, and where this action opens a door for forum shopping by the Government, has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers to vacate that extra-judicial order. See Sup.Ct.R 10(a).

(2). The decision of the Eleventh Circuit decided an important question of federal law – the limits of subject matter jurisdiction in appeals under Section 3731 of Title 18 – that has not been, but should be, settled by this Court. See Sup.Ct.R. 10(c).

Issue 2

Section 137 of Title 28, United States Code, vests the authority for the assignment of cases in United States District Courts and effectively denies that authority to Courts of Appeals.

In Section 1291 of Title 28, United States Code, Congress gave Courts of Appeals (other than the Court of Appeals for the Federal Circuit) "jurisdiction of appeals" from District Courts. Section 1291 gives Courts of Appeals no authority to make assignments of District Court cases. While appellate courts are generally considered to have "supervisory powers" over lower courts, the supervisory powers of Courts of Appeals are not unlimited; rather, they are limited to the reviewing of proceedings of lower courts and reversing judgments or orders which the appellate courts conclude are wrong. See *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). A use of supervisory powers is invalid if it conflicts with constitutional or statutory provisions. See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988). A Federal Court may not invoke the concept of supervisory power to avoid a limitation or usurp a function Congress has not conferred on it by legislation or which Congress has by legislation placed elsewhere. See *Bank of Nova Scotia v. United States*, *supra*; See also, *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *United States v. Hasting*, 461 U.S. 499, 505 (1983); *United States v. Payner*, 447 U.S. 727, 731 (1980). In directing that Petitioner's case be reassigned on remand the Eleventh Circuit undertook, in conflict with a statute, to exercise a power and jurisdiction Congress had placed elsewhere and exceeded its supervisory powers.

Congress has spoken, in Section 137 of Title 28, on the subject of case assignment in District Courts. Congress did

not vest this power in Courts of Appeals. Rather, Section 137 says:

> The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

If the rules and orders of a District Court are inadequate or ineffective to provide for the assignment of cases the second sentence of Section 137 further provides:

> The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

Section 137 goes even further and provides a mechanism for assigning cases if the first two sentences of the statute are inadequate or ineffective, providing:

> If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

By Section 137 Congress has surely made a comprehensive provision, as it has the power to do under Article III, vesting the exclusive authority for assigning District Court cases. It did not vest any case assignment power in Courts of Appeals. Congress is not presumed to draft laws in a way that creates duplications or omissions. See *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 79 (1990). Section 137 omitted nothing in providing for assignment of District Court cases. No other statute gives Courts of Appeals assignment powers for District Court cases. Section 137, we submit, excludes, and effectively preempts, any role or

jurisdiction for Courts of Appeals in assigning District Court cases.

Petitioner is not contending that Courts of Appeals have no role or no power or jurisdiction that may effectively cause the re-assignment of District Court cases in some instances. That power, however, is judicial, not administrative. Certainly, if there is an appeal or mandamus proceeding properly raising a recusal or disqualification issue and a reversal or grant of mandamus a Court of Appeals decision necessarily effects a case re-assignment, and its supervisory role empowers it to order re-assignment as a function of enforcing its judgment.

That is not the situation in a Section 3731 appeal. A Section 3731 appeal, as in the present case, calls for no ruling on the issue of recusal or disqualification. The appeal in this case only called on the Eleventh Circuit to decide if there was error in granting a motion in limine. It decided there was no error and affirmed the order in limine. That was the limit of its jurisdiction. The Eleventh Circuit's order directing re-assignment was gratuitous and not calculated to enforce its affirmance. The Eleventh Circuit usurped the power and authority placed elsewhere by Congress in Section 137 when it included in its June 23, 2006 decision an order re-assigning Petitioner's case after remand.

In ordering the re-assignment of Petitioner's case following remand the Eleventh Circuit has decided an important question of Federal law that has not been, but should be, settled by this Court. See Sup.Ct.R. 10(c). Petitioner prays that the Court will decide this important question defining the authority Congress has vested in

District Courts and Judicial Councils and denied to Courts of Appeals by the enactment of Section 137.

Issue 3

A Court of Appeals has no authority to order re-assignment of a case on remand in the absence of a statutory ground for recusal or disqualification.

Even if jurisdiction exists for a Court of Appeals to order re-assignment of a case following remand the question remains: does such jurisdiction empower a Court of Appeals to order re-assignment without reference to some ascertainable legal standard? We submit that it does not. We further submit that the legal standard which must support such a re-assignment order is Section 455 of Title 28, United States Code. Consideration of and reflection on the nature of "inferior" Federal Courts and the sources of their existence and power will confirm this conclusion.

Courts of Appeals unquestionably have jurisdiction to reverse cases appealed to them. See 28 U.S.C. §2106. This, however, does not mean a Court of Appeals may reverse a case it reviews on appeal without a reason. The power to "vacate, etc." . . . any judgment" surely does not mean the power can be exercised without regard to the law and the evidentiary and procedural facts presented by the appeal record. The authority to reverse depends on the presence of error in the District Court. See *United States v. Schooner Peggy*, 1 Cranch 103 (1801). Error depends on a failure to conform to some extant provision of law, either statutory or decisional. It seems apodictic that the same reasoning should apply, and that any powers granted by Section 2106 to re-assign cases on remand (if such power is included in the statute) can be exercised only where some

basis exists in law and in the appeal record that supports recusal or disqualification.

This is true because a gratuitous order from a Court of Appeals directing re-assignment on remand is tantamount to an order recusing or disqualifying a District Judge. A recusal or disqualification by direction for re-assignment on remand should not be allowed to rest on lesser grounds than what Congress – the author and source of jurisdiction and power for inferior Federal Courts – has ordained for recusal. Courts of Appeals should not have greater power on their own volition to disqualify District Judges than the grounds Congress has specified. Congress has declared, in Sections 144 and 455 of Title 28, the grounds for recusal or disqualification. A re-assignment order not premised on statutory grounds for recusal or disqualification and supported by the record necessarily exceeds, we submit, the authority Congress has given to Courts of Appeals.

The Eleventh Circuit's June 23, 2006 decision does not attempt to justify its re-assignment order by reference to either Section 144 or 455 (Section 144 would not, of course, apply since the affidavit it contemplates was not filed). Rather, the June 23, 2006 opinion apparently rests its re-assignment order on some perceived and assumed "super-authority" of a Court of Appeals to re-assign District Court cases. The assumption that the powers granted by Section 2106 includes the blanket and unrestricted right to order the recusal or disqualification of a District Judge is, we submit, a mistaken notion, for several reasons.

First, it expands the concept of supervisory powers beyond the definition of supervisory powers found in decisions of this Court such as *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). There supervisory powers are described in

less expansive terms which are more consistent with the express language of Section 2106 ("may affirm, modify, vacate, set aside or reverse any judgment, decree or order lawfully brought before it for review"). The Eleventh Circuit's re-assignment order was not based on express language in Section 2106 and did not flow as a consequence of its appellate decision affirming the granting of a motion in limine.

Second, since Courts of Appeals are creatures of and must derive their power and authority from Congressional enactments, and are courts of limited jurisdiction, it seems certain that any power to recuse or disqualify a District Judge found in Section 2106 must also have a source in or a relationship to some other Congressional enactment. Such a statutory source or relationship is necessary for compatibility with the concept that a Court of Appeals is a court of limited jurisdiction. That related enactment could only be Section 455, where Congress has set the grounds for recusing or disqualifying judges. If a Court of Appeals can disqualify without a record supporting disqualification under Section 455 a Court of Appeals becomes a "super" monitor of disqualification issues without statutory guidance or controls, a power Congress has never conferred.

The decisions of various Courts of Appeals show a variety of stances on the power of Courts of Appeals to order re-assignment on remand. There is lack of uniformity between decisions in the same Circuit. The variety is illustrated by the following decisions:

1. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1525, 1528 (11th Cir. 1988), which seems to indicate that re-assignment

should be ordered only where there is grounds for recusal or disqualification under Section 455.

2. *United States v. Ming He*, 94 F.3d 782, 795 (2nd Cir. 1996); *United States v. North Carolina*, 180 F.3d 574, 583 (4th Cir. 1999); *In Re DaimlerChrysler Corp.*, 294 F.3d 697, 700-02 (5th Cir. 2002); *Bercheny v. Johnson*, 633 F.2d 473, 476-77 (6th Cir. 1980); *Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 235 F.3d 1184, 1186 (9th Cir. 2000); and *United States v. Torkington*, 874 F.2d 1441, 1446-47 (11th Cir. 1989), which seem to apply the following three-part test, possibly based in part on Section 455, to determine if re-assignment is warranted:

> (1). Whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected.
>
> (2). Whether reassignment is advisable to preserve the appearance of justice, and
>
> (3). Whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

3. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1464-65 (D.C. Cir. 1995) and *Proctor & Gamble Co. v. Haugen*, 427 F.3d 727, 744-45 (10th Cir. 2005), which seem to follow no real standard but which hold re-assignment is permissible under such nebulous concepts as "unusual circumstances" or "extreme circumstances".

Another justification for re-assignment on remand cited by some Courts of Appeals is where an appellate decision reverses an order of a trial judge. These decisions

reason that where the record demonstrates a strong attachment of a trial judge to a reversed order, human nature being such as it is, this can reasonably support a conclusion that the trial judge should not continue to preside after reversal of his or her order. That was the situation and part of the rationale in the *Torkington* case, *supra*, which was cited by the Eleventh Circuit as its authority.

If Section 455 is the test, as we submit it should be, for ordering re-assignment on remand, the record in this case unquestionably disproves a basis for recusal or disqualification. There can be no contention that Section 455(b) operates to disqualify Judge Clemon. The Eleventh Circuit opinion recites that the record shows no "actual bias" (App. 5), thereby eliminating the applicability of Section 455(b)(1). There is no recitation in the Eleventh Circuit's opinion, or any contention, that the remaining sub-parts of Section 455(b) apply. Therefore, the existence of statutory grounds for disqualification depends on a showing from the record that Judge Clemon's "impartiality might reasonably be questioned" within the meaning of Section 455(a).

In *Liteky v. United States*, 510 U.S. 540, (1994) this Court established three imperative considerations in determining if there is the lack of impartiality described by Section 455(a). First, judicial rulings alone almost "never" constitute a valid basis for finding bias or partiality. 510 U.S. at 555. Second, opinions formed by a judge from facts introduced or events occurring in the course of the current or prior proceedings do not constitute bias or partiality unless they display a "deep seated favoritism or antagonism" that makes a fair judgment "impossible". 510 U.S. at 555. Third, proof of a significant extra-judicial

source for favoritism or antagonism is supportive of an accusation of favoritism or antagonism. 510 U.S. at 554-55. A concurring opinion in the *Liteky* case also pointed out that a high threshold is required to meet Section 455(a) standards. 510 U.S. at 558. Consequently, if there is to be a valid finding of lack of impartiality under the *Liteky* case the record must clearly demonstrate either a significant extra-judicial source for a bias or judicial rulings or opinions not formed on the basis of facts introduced or events occurring in the course of the current or prior proceedings and evidence which shows circumstances that make a fair judgment "impossible".

The Eleventh Circuit opinion points to no basis in the record for a finding of an extra-judicial source of a bias. It points only to judicial rulings by Judge Clemon to justify the re-assignment order. It points to no evidence from the record that make a fair judgment "impossible". Therefore, the Eleventh Circuit decision makes no findings that would justify re-assignment on the basis of Section 455(a) under the *Liteky* case considerations.

The Eleventh Circuit recites in its June 23, 2006 opinion that "The government's proof of bias is taken primarily from the transcript of the Siegelman-Hamrick proceedings", and that it had offered "little or no proof from the proceedings specifically against Bobo" (App. 5). The Siegelman-Hamrick case was severed from Petitioner's case on September 21, 2004, and thereafter proceeded separately (App. 69-70). In fact, the proceedings against Siegelman and Hamrick were terminated on October 5, 2004, over 20 months before the June 23, 2006 decision. At the time of the Eleventh Circuit decision the Siegelman-Hamrick proceeding could not have been intertwined with Petitioner's case.

The June 23, 2006 opinion says that Judge Clemon sustained objections to questions "where Bobo's attorney apparently failed to raise any", and asserts that this "might give rise to the appearance of lack of impartiality" (App. 5). This assertion in the opinion is refuted by the record. The proceedings referred to were hearings in the Siegelman-Hamrick case where Petitioner's attorney was not a participant (App. 107-08). The Eleventh Circuit opinion does not, and could not, point to an instance where objections were sustained in the absence of an objection by Bobo's (Petitioner's) attorney in a hearing involving Petitioner (App. 107-204).

The June 23, 2006 opinion further asserts that from this non-existent occurrence (the *sua sponte* sustaining of objections) there might be "the appearance of a lack of impartiality in the mind of a reasonable member of the public" (App. 5), but it does not explain or justify how such a conclusion could be derived, especially in view of the fact that the putative occurrence it describes did not occur (App. 107-204). Neither does the opinion explain how "a lack of impartiality in the mind of a reasonable member of the public" was discerned or how the matters were intertwined in the "public mind" (App. 5). These assertions in the June 23, 2006 opinion conflict with the following observation of Mr. Justice Scalia in *Cheney v. United States District Court*, 541 U.S. 913, 914 (2004), in describing the standard of proof for application of Section 455(a):

> The decision whether a judge's impartiality can reasonably be questioned is to be made in light of the *facts as they existed and not as they were surmised or reported*. (Emphasis added)

See also *Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co. Inc.*, 535 U.S. 229, 232 (2002) (the

Section 455(a) standard pre-supposes "knowing all the circumstances"). The conclusion that matters in the Siegelman-Hamrick case and in Petitioner's case "are unquestionably intertwined, perhaps especially in the public mind", is rank speculation. The Eleventh Circuit opinion points to no part of the record where "facts as they existed" show a lack of impartiality as far as Petitioner is concerned or facts which render a fair trial in Petitioner's case "impossible". See *Liteky v. United States*, *supra*.

Consequently, the Eleventh Circuit has made no finding and identified no evidence from the record of "facts as they existed" which show a basis for disqualification under Section 455.

The Eleventh Circuit decision does not even identify evidence or factors that would comply with the three-part test or other tests used by several Courts of Appeals. There was not, and could not have been, a finding with respect to the first part of the three-part test. The Eleventh Circuit determined no ruling by Judge Clemon to be erroneous. Additionally, there was no finding based on the record and "facts as they existed and not as they were surmised or reported" in this case of evidence that re-assignment was advisable to preserve the appearance of justice or that re-assignment would not entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

The practice followed in the cited cases of ordering re-assignment after a reversal has no application here. The order appealed from was affirmed (App. 5).

The authority of a Court of Appeals to gratuitously order the re-assignment of a case on remand from an

appeal by the Government pursuant to Title 18, Section 3731 where the record does not establish a statutory ground for recusal or disqualification as set out in Sections 144 or 455 of Title 28 is an important question of Federal law that has not been, but should be, settled by this Court. See Sup.Ct.R. 10(c).

CONCLUSION

The issues discussed in this petition need resolution because:

1. The plenary right of a Court of Appeals to order re-assignment on remand as was done in this case:

(a) expands the appeal jurisdiction and the Government's appeal rights under Title 18, Section 3731. The Government has limited appeal rights in criminal cases. See 18 U.S.C. §3731.

(b) undermines the integrity of the rules and procedures of District Courts. District Courts are empowered by Congress to make rules and to assign cases. See 28 U.S.C. §137.

(c) expands the powers Congress has given Courts of Appeals beyond the accepted concept of supervisory powers. See *Cupp v. Naughten*, *supra*.

2. A re-assignment other than for statutory grounds for recusal or disqualification promotes the practice of forum shopping. Indeed, in the present case the Government, despite its failure to obtain recusal of Judge Clemon

by regular procedures (a motion filed before him and a previous mandamus petition) was able to engage in forum shopping and disqualify Judge Clemon by merely arguing for recusal in a brief on a Section 3731 appeal challenging an order in limine. If Courts of Appeals have an unlimited power to re-assign cases merely at the request of a party, as the Eleventh Circuit assumed it had in this case, then forum shopping becomes an opportunity and a risk anytime there is an interlocutory appeal (which usually requires remandment) or a remandment for any reason. This opportunity for forum shopping should be foreclosed by a strict enforcement of the scope of an appeal under Title 18, Section 3731, an interpretation and construction of Title 28, Section 137 which finds no role for a Court of Appeals in assigning District Court cases, and an interpretation and construction of Section 2106 which restricts the right of Courts of Appeals to order re-assignment upon remand to those cases where the record shows a statutory basis for recusal or disqualification of a District Judge.

Also, there is a conflict among the Circuits, as discussed above, on the subject of when a Court of Appeals may order re-assignment on remand. This conflict should be resolved by granting this petition. See Sup.Ct.R. 10(a).

For the reasons discussed, Petitioner requests the Court to grant the writ of certiorari prayed for in this petition, to vacate that part of the judgment of Eleventh Circuit which ordered re-assignment of Petitioner's case upon remand, and

for a review of these important questions of the jurisdiction, power and authority of Courts of Appeals.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

Page

1. Opinion and decision of United States Court of Appeals for the Eleventh Circuit dated June 23, 2006 ..... App. 1

2. Judgment of United States Court of Appeals for the Eleventh Circuit dated June 23, 2006 .... App. 6

3. Order of United States Court of Appeals for the Eleventh Circuit dated September 1, 2006 denying petition for rehearing and rehearing en banc ..... App. 7

4. Provisions of United States Code: Title 28, Section 455 ..... App. 9

Other materials:

5. Order of United States District Court for Northern District of Alabama and attached memorandum opinion entered August 30, 2004 denying Government's motion to disqualify judge ..... App. 13

6. Petition for writ of mandamus filed by Government in the United States Court of Appeals for the Eleventh Circuit to review order denying disqualification motion ..... App. 41

7. Decision of United States Court of Appeals for the Eleventh Circuit entered September 29, 2004 denying Government's petition for writ of mandamus ..... App. 68

8. Order entered in United States District Court for Northern District of Alabama on September 21, 2004 severing prosecutions against defendants Siegelman and Hamrick from prosecution against defendant Bobo ..... App. 69

APPENDIX TABLE OF CONTENTS – Continued

Page

9. Order dismissing prosecution against defendants Siegelman and Hamrick entered October 15, 2004.....App. 71

10. Order entered November 10, 2005 granting Petitioner's motion in limine .....App. 72

11. Notice of appeal by Government filed November 14, 2005 from order entered November 10, 2005 granting motion in limine.....App. 75

12. Order to show cause dated January 27, 2006 .....App. 78

13. Order denying Government's re-assignment request dated March 7, 2006 .....App. 80

14. Portion of Government's Brief filed on February 16, 2005 in the Eleventh Circuit in Case Number 05-16392-GG.....App. 82

15. Portions of Transcript of pre-trial proceedings conducted on October 4, 2004 in prosecution against defendants Don Eugene Siegelman and Paul Michael Hamrick.....App. 107

185 Fed.Appx. 885

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-16392

D.C. Docket No. 04-00200-CR-UC-RRA

PHILLIP KELLEY BOBO,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(June 23, 2006)

Before ANDERSON, BARKETT and BOWMAN*, Circuit Judges.

PER CURIAM:

The government brings this interlocutory appeal from a pre-trial order limiting the evidence and argument

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* Honorable Pasco M. Bowman, II, United States Circuit Judge for the Eighth Circuit, sitting by designation.

which it may present in its prosecution of Philip Kelley Bobo for health care fraud and related offenses after a remand from this court. The government also requests reassignment of this case upon remand.[1]

After we vacated Bobo's initial conviction for conspiracy and health-care due to a defective indictment, *United States v. Bobo*, 344 F.3d 1076 (11th Cir. 2003), Bobo was indicted once more, on the basis of new evidence, for: (i) conspiracy, in violation of 18 U.S.C. § 371; (ii) health-care fraud, in violation of 18 U.S.C. § 1347; (iii) wire fraud, in violation of 18 U.S.C. § 1343; (iv) misapplication of funds from a federally funded program, in violation of 18 U.S.C. § 666; (v) two counts of witness tampering, in violation of 18 U.S.C. § 1512; (vi) making false statements to a federal agent, in violation of 18 U.S.C. § 1001; and (vii) making false statements to the court, a violation of 18 U.S.C. § 1623. The second indictment also brought charges against two alleged co-conspirators, Don Siegelman and Paul Hamrick.

The charges against Bobo arose out of his allegedly fraudulent conduct during the bidding process for contracts issued under the Alabama Medicaid Maternity Care Program (MCP). Although that bid process was not directly governed by Alabama's Competitive Bid Law (CBL), because the CBL specifically exempts contracts securing the services of physicians (like Dr. Bobo), *see* Ala. Code § 41-16-51(a)(3), MCP specifically adopted the CBL's

[1] Because the issues in this case are intertwined with facts and events memorialized in the transcripts and exhibits from Bobo's first trial, as well as from proceedings occurring after the case was remanded from this court, we deny Bobo's motion to strike these materials from the record on appeal.

provisions for its own bid process. Nonetheless, in the indictment against Bobo, the government charged that "Alabama law prohibited bidders from making agreements that undermine competition in the bid process," citing to the CBL, Ala. Code § 41-16-55. Prior to trial, Bobo moved to preclude the government from introducing evidence that contracts issued under the MCP are covered by the CBL. The court granted the motion, explaining that:

> "[t]he indictment in this case . . . alleges that 'Alabama state law authorized the Alabama Medical agency to award contracts using a competitive-bid process, which the agency chose to do.' . . . However, in the very next sentence, the Indictment alleges: 'Alabama law prohibited bidders from making agreements that undermine competition in the bid process. Ala. Code § 41-16-55.' But the statutory provision cited in the Indictment is part of the Alabama Competitive Bid Law."

Thus there is no doubt that the district court at least recognized what the government conceded at oral argument – namely, that Bobo cannot be charged with a violation of Alabama law as that law itself excludes Bobo from its ambit.

However, while Alabama law does not *require* MCP contracts to be awarded under the CBL, no authority dictates that the Alabama Medicaid Agency was *prohibited* from choosing to select MCP providers according to the CBL's requirements and procedures.[2] The CBL governed

[2] The district court's order correctly relied upon an opinion of the Alabama Attorney General specifically allowing that "[w]hether the Competitive Bid Law is applicable or not, an agency may utilize the

(Continued on following page)

Bobo's behavior not because state law mandated its applicability, but because the Agency chose to employ it and because Bobo, in order to pursue the MCP contracts, explicitly agreed to abide by its requirements. Thus, when the district court ordered that the government "shall not offer evidence or argue that the [MCP] contracts referenced in the Indictment are covered by the [CBL]," it could not have meant that the government is precluded from offering evidence regarding alleged violations of the bid process that would support any federal cause of action. Similarly, when the district court allowed that the government is "not preclude[d] . . . from arguing and proving that the MCP did, in fact, use a bid process for its contracts," it could not have meant that the government may not invoke the language of the CBL, or even the source of that language, as proof of said bid process. In short, we construe the order to permit the government to argue and present evidence of the bid process's relevant provisions and their violation for the purposes of the federal charges against Bobo, so long as it does not argue or present evidence that Bobo violated Alabama law. To the extent that the district court intended to draw this important distinction, it committed no reversible error.

With reference to the government's motion to have this case reassigned on remand, we initially note that a panel of this court denied the government's earlier motion for this relief as outside the scope of the government's interlocutory appeal. However, "[a] ruling on a motion or other interlocutory matter . . . is not binding upon the panel to which the appeal is assigned on the merits, and

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competitive bid process to award a contract if the process will achieve the best product at the lowest price." Op. Ala. Att'y Gen. 2001-0089 at 5.

the merits panel may alter, amend, or vacate it." 11th Cir. Rule 27-1(g). *See McFarlin v. Conseco Services, LLC*, 381 F.3d 1251, 1253 (11th Cir. 2004); *Jones v. United States*, 224 F.3d 1251, 1256 (11th Cir. 2000); *United States v. White*, 846 F.2d 678, (11th Cir. 1988). Having reviewed the entire record in this case as well as the Siegelman-Hamrick trial, we now reconsider the government's motion.

The government's proof of bias is taken primarily from the transcript of the Siegelman-Hamrick proceedings, and the government offers little or no proof from proceedings specifically against Bobo that the district court was or is biased against its prosecution of this particular defendant. Nonetheless, these matters are unquestionably intertwined, perhaps especially so in "the public mind" whose "image of absolute impartiality and fairness of the judiciary" we must vigilantly preserve. *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989). Although the trials judge's involvement in the Siegelman-Hamrick proceedings does not rise to the level of actual bias, certain aspects of his participation, such as sustaining objections where Bobo's attorney apparently failed to raise any, might "give rise to the appearance of . . . a lack of impartiality in the mind of a reasonable member of the public." *Id.* Thus "we respond to the appearance of a lack of neutrality" and, in the interest of eliminating any doubt of judicial fairness and impartiality, we direct that this case be reassigned to a different judge upon remand for further proceedings.

AFFIRMED and REMANDED for further proceedings with the direction that the matter be REASSIGNED by the most senior active judge of the Northern District of Alabama who has not been recused in this case.

United States Court of Appeals
For the Eleventh Circuit

No. 05-16392

District Court Docket No.
04-00200-CR-UC-RRA

PHILLIP KELLEY BOBO,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

JUDGMENT

(Filed Jun. 23, 2006)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered:	June 23, 2006
For the Court:	Thomas K. Kahn, Clerk
By:	Harper, Toni

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-16392-GG

PHILLIP KELLEY BOBO,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Sep. 1, 2006)

Before: ANDERSON, BARKETT AND BOWMAN*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

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* Honorable Pasco M. Bowman, II, United States Circuit Judge for the Eighth Circuit, sitting by designation.

ENTERED FOR THE COURT:

/s/ Rosey Barkett
UNITED STATES
CIRCUIT JUDGE

28 U.S.C. § 455. Disqualification of justice, judge, or [magistrate judge]

(a) Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate [magistrate judge] shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate [magistrate judge], or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice,

judge, magistrate [magistrate judge], bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(June 25, 1948, ch 646, § 1, 62 Stat. 908; Dec. 5, 1974, P.L. 93-512, § 1, 88 Stat. 1609; Nov. 6, 1978, P.L. 95-598, title II, § 214(a), (b), 92 Stat. 2661; Nov. 19, 1988, P.L. 100-702, Title X, § 1007, 102 Stat. 4667.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff.	)	
vs.	)	Case Number
PHILLIP KELLEY BOBO, DON EUGENE SIEGELMAN, and PAUL MICHAEL HAMRICK, Defendants.	)	**CR 04-C-0200-W**

ORDER OVERRULING DISQUALIFICATION MOTION AND THE MOTION FOR RECONSIDERATION

(Filed Aug. 30, 2004)

For the reasons explained in the accompanying Memorandum Opinion, the motion of the United States Attorney to disqualify this judge (Doc. 165), as supplemented, is hereby **OVERRULED**.

The Motion to Reconsider (Doc. 173) is **DENIED.**

Done this 30th day of August, 2004.

/s/ U.W. Clemon
Chief United States District Judge
U.W. Clemon

395 F.Supp.2d 1116

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	Case Action Number
PHILLIP KELLEY BOBO, DON EUGENE SIEGELMAN, and PAUL MICHAEL HAMRICK, Defendants.	)	CR 04-C-0200-W

MEMORANDUM OPINION ON UNITED STATES ATTORNEY'S MOTION FOR RECUSAL OF THIS JUDGE AND TO RE-ASSIGN THE CASE TO A NON-ALABAMA FEDERAL JUDGE

(Filed Aug. 30, 2004)

On the eve of the scheduled date for an evidentiary hearing on Defendant Phillip Bobo's Motion to Dismiss the Indictment, United States Attorney Alice Martin ("USA") moved to disqualify this judge and, in effect, every other federal judge in the State of Alabama. Because the motion is based solely on innuendos, false and misleading newspaper articles, unfounded suspicions and distorted facts, is due to be denied.

This Opinion is divided into four sections. First, the facts will be set out. The second section will treat the media coverage of the disqualification issue. In the third section, the applicable legal principles will be articulated.

The final section will apply the legal principles to the facts.

A. THE FACTS

1. I have no ties to Defendant Don Eugene Siegelman ("Siegelman"). I incorporate herein by reference the Judicial Notice of Adjudicative Facts filed on July 16, 2004." (Doc. 68, Judicial Notice) (*See* "Attachment A" to this Opinion.) The USA, through her Assistant United States Attorney ("AUSA") Matt Hart has conceded these facts. (Doc. 170, Tr. of Mot. to Disqualify of 08/17/04 at p. 4.)

2. My daughter, A. Michelle Clemon, is not my dependent and does not reside in my household.

3. Before the indictment was handed down in this case, my daughter was an associate at the law firm of Maynard, Cooper & Gale ("Maynard Cooper"). She has and had no financial interest in the firm whatsoever.

4. During her employment at Maynard Cooper, the Attorney General of the State of Alabama appointed her supervisor, David Smith, as a Deputy Attorney General to represent the State of Alabama and several of its agencies in *Crum v. State of Alabama,* 198 F. 3d 1305 (11th Cir.1999), an employment discrimination case filed in 1994.[1]

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[1] In its Motion For Reconsideration of the Court's Denial of the Government's Motion For Recusal, (Doc. 173), the USA argues that it was "Governor Siegelman, Through His Chief Legal Advisor Edward Hosp, and Not Attorney General Pryor, [who] Made the Decision to Hire A. Michelle Clemon's Direct Supervisor David Smith and the Maynard, Cooper Law Firm." (*Id.* at p. 1.) The letter cited by the USA is dated five days prior to the letter of appointment.

(Continued on following page)

5. My daughter's salary and bonuses at Maynard Cooper were not affected in any way by her work in the *Crum* litigation.

6. Although Siegelman was a nominal party to the *Crum* case, Maynard Cooper did not represent him.

7. For purposes of the USA's alleged non-judicial bias towards federal investigative agents, I incorporate herein by reference Footnote 1 of my Memorandum Opinion on attorney disqualification. (Doc. 149, Mem. Op. Granting Mot. to Disqualify Douglas Jones and the Law Firm of Whatley Drake at p. 2 n. 1) (*See* "Attachment B" to this Opinion.)

But David Smith's statements are unequivocal:

> The Attorney General, Bill Pryor, is the person who contacted me about getting involved in that case and is the one who then formally engaged me and our firm to enter an appearance in that case. . . .
>
> Attorney General Pryor and I had a relationship for years before he hired me. And I – so I know that the Attorney General had considered involving me before I was involved, so I didn't require a referral to me, per se. . . .
>
> Well, I have knowledge that the governor's office approved, or somehow concurred, in the attorney general's decision to engage me in that case.

(Doc. 170, Tr. of Mot. to Disqualify at pp. 9-10, 12.) The October 15, 1999 letter simply conveyed then Governor Siegelman's approval or concurrence in the Attorney General's decision to hire David Smith. This conclusion is buttressed by the fact that David Smith and the Maynard Cooper law firm continued to represent the state agencies in *Crum* even after Siegelman was defeated in his bid for re-election.

8. I did not say to Los Angeles IRS Agent Cochran in 1995, or to anyone else at any time, that I have no confidence in federal investigative agents.[2]

9. I did not make the statements concerning federal prosecutors and law enforcement officials attributed to me in the FBI Form 302 interview notes of Joseph Rembert.

10. I do not remember which federal investigative agent served on me a subpoena for my church's records in 1995 or 1996. Whoever he/she was, I hold no personal animus towards him/her, as I fully appreciate the fact that the agent was merely performing his/her duties. AUSA Hart concedes that the USA has no evidence to the contrary. (Doc. 170, Tr. Of Mot. to Disqualify of at p. 30.)

11. Since the Los Angeles grand jury investigation was concluded eight years ago, without objection, I have met socially, *ex parte,* and on the record with federal prosecutors, FBI agents, and other law enforcement officials. I rely on them for crucial functions including,

[2] During the course of the Los Angeles investigation, I had two conversations with Los Angeles IRS Agent Ann Cochran. The first conversation took place on February 14, 1995, when she and FBI Agent Mary Jo Marino appeared at my home, informed me that I was a subject of the grand jury investigation in Los Angeles, served me with a subpoena for my personal records, and requested an interview. Two days later, Agent Cochran telephoned me while I was on the bench. I returned her call, and she reiterated her request that I submit to an interview. In responding to her request, I reflected that seventeen years earlier, a very accommodating Los Angeles FBI agent had intercepted me at Los Angeles International Airport, informed me that my name was on an Alabama KKK hit list, and offered his assistance and advice. I mentally compared his attitude and treatment with my more recent unpleasant experience with FBI Agent Marino, and I said to Ms. Cochran that my confidence level in FBI investigative agents was not the same in 1995 as it had been earlier.

without limitation, the *ex parte* issuance and extension of wiretap orders. To the extent that such agents have testified as witnesses in adversary proceedings where I was the factfinder, I have assessed their credibility in precisely the same way as I have assessed the credibility of other witnesses. To my knowledge, none of them have complained of any hostility or bias on my part against them based on their status as federal law enforcement officials.[3]

11. Contrary to AUSA Hart's allegation,[4] I have never been a member of the Jefferson County Citizens Coalition.

12. In the hearing on the USA's Motion to Disqualify Siegelman's counsel, I did not display such deep seated antagonism against federal prosecutors, and specifically Department of Justice Attorney ("DOJ") Staci Ludwig, that a fair judgment would be impossible.[5]

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[3] The USA's Motion for Reconsideration (Doc. 173) states as one of the "succinct facts" that I believe "there are some bad agents" and selectively quotes five words from the Transcript of the Motion Hearing of August 17, 2004. (Doc. 173, Mot. for Reconsideration, p. 7 at line 22.) The full sentence from the transcript is as follows: "THE COURT: And there are, in my judgment, good and bad lawyers, judges, FBI agents, court reporters, news reporters." (Doc. 170, Tr. of Mot. to Disqualify of 08/17/04, p. 28 at line 17.) I re-affirm that judgment in its entirety.

[4] "In response [to the Los Angeles investigation], the Jefferson County Citizens Coalition, a political organization from the State of Alabama **of which this judge was a member prior to taking the bench**, mobilized to his defense."(Doc. 165, Mot. and Mem. In Support of Mot. for Recusal of 08/16/04 at p. 11) (emphasis added.)

[5] I accommodated Ms. Ludwig's request to take her motion out of turn, so that she could catch an early flight back to Washington (Doc. 152, Tr. Of Motions Hr'g. of 07/28/04 at pp. 3-4.)

(Continued on following page)

13. I have had no direct or indirect financial connections to William ("Bill") Baxley in any way since our attorney-client relationship ended eight years ago. (*See* AUSA Hart's concession, Doc. 170, Tr. of Mot. to Disqualify at p. 42.)

14. Sixteen years ago, a friend and I jointly acquired an interest in a real estate partnership. In 1989, a year later, I assigned my interest in the partnership to my friend. After the assignment, my friend sold his interest in

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During the course of the hearing, Ms. Ludwig interrupted me while I was talking. The first time it happened, before the lunch recess, I warned her against doing so. (*Id.* at pp. 113, 114.) After lunch she interrupted me a second time. (*Id.* at p. 173.) As with other attorneys that have interrupted me from the bench, I promptly directed the Deputy United States Marshal to take her into custody at the next recess.

(*Id.* at p. 174.) After resting her case before the next recess, Ms. Ludwig sought leave to approach the bench and said:

> Your Honor, I understand that I inadvertently talked over you recently. I certainly didn't mean to do so. I was very concerned about – I was focused on the testimony that the witness was going to give, and I was thinking that it was confidential government information, and I was very concerned about the revealing of that particular information.
>
> I, in no way, meant to interrupt Your Honor, but I was very concerned about that. And in my view of trying to protect that information, I inadvertently talked over Your Honor, and I sincerely apologize for doing so.

(*Id.* at pp. 180-181.) I responded:

> All right. But if you thought that the matter, the confidential government matter was about to be divulged, I would have expected you to have the matter taken up *in camera*, which is how we usually do it, isn't it?
>
> I accept your apology, and I say to you that I don't expect this to happen again.

(*Id.* at p. 181.)

the real estate partnership to the father of one of Bill Baxley's law partners. My friend subsequently paid me for my assignment. It is my understanding that the father of Bill Baxley's law partner ultimately recouped the full amount of his investment. In any event, my direct and indirect interests in the real estate partnership came to an end fourteen years ago.

15. Most of the facts in the preceding paragraph are reflected in Northern Alabama grand jury records filed under seal with the Court in this case on August 25, 2004. (Doc. 174, Mot. for Reconsideration, Addendum.)[6]

16. Since 1996, I have presided over several cases in which Bill Baxley and Joel Dillard represented a party. The most highly publicized of these was *United States v. Bowman,* No. CR-03-C-0056-E, 2003 WL 23272667 (N.D. Ala. Sept. 12, 2003). As in all other prior cases, with full knowledge of everything contained in the sealed grand jury records, the USA never suggested that I was in any way disqualified from hearing the *Bowman* case.

17. According to AUSA Hart, Bill Baxley represents an alleged "key co-conspirator," Amy Herring, who will be

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[6] Grand jury records are secret, and they "must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Fed. R. Crim. P. 6(e)(6). The Supreme Court considers the secrecy of the grand jury to be "indispensable" to the functioning of the grand jury system. Wright, *Federal Practice and Procedure*: Criminal 3d § 106. These records will remain sealed in this Court to protect the security of witnesses who have testified before the grand jury, to protect the innocent who are exonerated by the grand jury from disclosure of the fact that they have been under investigation and preclude their being held up to public ridicule. *Douglas Oil Co. of California v. Petrol Stops Northwest,* 441 U.S. 211, 219 (1979).

called to testify in this case. Amy Herring is a cooperating witness for the USA, and Bill Baxley is facilitating that cooperation. (Doc. 170, Tr. of Mot. to Disqualify at p. 43.) Bill Baxley is not expected to enter an appearance in this case. (*Id.* Doc. 170, Tr. of Mot. to Disqualify at p. 63.)

18. Six other judges of this Court, including senior judges, are presumptively qualified to hear this case in the event of my disqualification.

B. MEDIA COVERAGE OF THE DISQUALIFICATION ISSUE[7]

This case will be tried in the Tuscaloosa Division of the Northern District of Alabama. The *Tuscaloosa News* is the primary daily newspaper in Tuscaloosa, Alabama.[8] That newspaper has covered this case in at least ten articles since I was assigned to the case. Most of the statements in these articles concerning me have been factually correct. The *Tuscaloosa News* has issued a single editorial related to the issue of my disqualification. In the editorial, the *Tuscaloosa News* notes my daughter's former employment and the fact that as a judge, I have "crossed swords with Siegelman" but it concludes that none of these facts may warrant recusal. *Judicial Roulette Isn't Working,*

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[7] The Court addresses this issue largely in response to the "History of Judicial Recusal In This Case" section of the USA's combined motion-brief, which is replete with references to newspaper articles. (Doc. 165, Mot. and Mem. In Support of Mot. for Recusal of 08-16-04 at pp. 2-4.)

[8] The Tuscaloosa (Western) Division of the Northern District of Alabama consists of Bibb, Greene, Pickens, Sumter, and Tuscaloosa counties. 28 U.S.C. § 81(a)(5). Birmingham is in the Southern Division of the Northern District of Alabama. The Southern Division consists of Jefferson, Shelby, and Blount counties. 28 U.S.C. § 81(a)(3).

Tuscaloosa News, July 15, 2004. However, the editorial questions the wisdom of the Court's use of a "computerized random selection" system to assign this "politically charged case." *Id.*

The Birmingham News is the only newspaper which, in articles largely written by its reporter Brett J. Blackledge,[9] has editorialized several times that I should disqualify myself from this proceeding – long before the USA filed this instant motion. Several of the most substantive allegations made in Mr. Blackledge's articles are simply untrue.

He has written that my daughter was a partner at the Maynard Cooper law firm. He has written of my "long-standing ties" to Defendant Don Siegelman. In a front-page article entitled "Judge, U.S. Have Often Squared Off," after relating my alleged mistreatment of DOJ Attorney Ludwig, Mr. Blackledge wrote that:

> This was not the first clash Clemon has had with the government. The government launched a criminal investigation against him. The government sent his sister to prison. The government filed a lien against him for not paying taxes. . . .
>
> At least twice Clemon has been forced off cases when he refused to step down because of potential conflicts. One case involved a federal desegregation suit in which Clemon as a civil rights lawyer had once represented some of the parties and had ties to one of the lawyer. Another

[9] For at least a decade, prize-winning reporter Val Walton has regularly covered federal courthouse matters for *The Birmingham News*.

> case was one against the Alabama Revenue Department, which previously had gone after Clemon for not paying state taxes.

Brett J. Blackledge, *Judge, U.S. Have Often Squared Off,* Birmingham News, August 1, 2004, at A1.[10] One of Blackledge's articles indicated that the law firm of Whatley Drake, which I recently disqualified from representing

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[10] The article does not mention that, unbeknownst to me, the lien was filed by IRS Agent Albert Page over twenty-five years ago. Page asserted that the lien was filed because I failed to make a tax payment as promised. During the Senate Judiciary Committee hearings on my confirmation, Senator Howell Heflin requested an FBI investigation of the matter. The investigation revealed that I had in fact made the payment as promised, and that Mr. Page had altered IRS records to delete his original entries reflecting that I had telephoned him and said that the payment was being sent to his office on the promised date. The Judiciary Committee thereafter unanimously recommended my confirmation; and the Senate by unanimous vote confirmed me as the first black federal judge in Alabama history.

The Birmingham News' coverage of my confirmation twenty-five years ago was critically analyzed in the publication of the Columbia School of Journalism – an institution which, like the Pulitzer Prizes, owes its existence to the will of Joseph B. Pulitzer. *See,* Stephen Barlas, *Chronicle: Birmingham Press Gets Tough – on Blacks,* Columbia Journalism Review 5,9 (1980).

To be sure, seventeen years ago the Eleventh Circuit disqualified me from serving as judge in the higher education cases, *United States v. State of Alabama,* 828 F.2d 1532 (11th Cir.1987). But the Circuit expressly rejected the argument that I should be disqualified because of personal and political ties to counsel for one of the defendants. *Id.,* at 1543, n. 46. There is no basis for Mr. Blackledge's statement that I was also disqualified because of my prior representation to some of the parties to the litigation. In fact, I had not represented any of them, and the Eleventh Circuit never said so. *Id.* at 1545.

I am unaware that the Alabama State Department of Revenue has ever sought my disqualification in any case; and in any event, I deny that the Eleventh Circuit has ever disqualified me from any case other than *United States v. Alabama,* 828 F.2d 1532.

Siegelman in this proceeding, also previously represented me in the California grand jury investigation,[11] when in fact the firm did not exist eight years ago.

The *Birmingham Post-Herald* is the afternoon daily newspaper in Birmingham which is located in the Southern Division of the Northern District of Alabama. The *Birmingham Post-Herald* featured several articles concerning this case. On the issue of my disqualification, Elaine Witt, a featured commentator for that newspaper, voiced her observations in a column affixed to this Opinion as "Attachment C."

C. THE APPLICABLE LEGAL STANDARDS

Title 28 U.S.C. § 455(a) requires a federal judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned. The relevant inquiry "is not the reality of bias or prejudice, but its appearance." *Liteky v. United States,* 510 U.S. 540, 548 (1994). The standard is whether an objective, fully informed lay observer would entertain significant doubt about the judge's impartiality. *Thomas v. Tenneco Packaging Co., Inc.,* 293 F.3d 1306, 1329 (11th Cir.2002); *Christo v. Padgett,* 223 F.3d 1324, 1333 (11th Cir.2000). In other words, the relevant inquiry is "how things appear to the well-informed, thoughtful and objective observer, rather than the hypersensitive, cynical, and suspicious person." *United States v. Jordan,* 49 F.3d 152, 156 (5th Cir.1995).

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[11] Brett J. Blackledge, *Firm Has Ties to Earlier Defense of Clemon,* The Birmingham News, Aug. 2, 2004, at A1-A2.

Section 455(a) does not require the judge to accept as true all allegations in determining whether a reasonable person would harbor doubts concerning his partiality: for "[i]f a party could force recusal of a judge by factual allegations, the result would be a virtual 'open season' for recusal." *United States v. Greenough,* 782 F.2d 1556, 1558 (11th Cir.1986). A charge of impartiality must be supported by the facts.

If the judge's relative is an associate in a law firm, "and the relative's compensation is in no manner dependent upon the result of the particular case before the judge, recusal is not mandated." Committee on Codes of Conduct ("Committee"). Advisory Opinion No. 58, *United States ex rel. Weinberger v. Equifax,* 557 F.2d 456 (5th Cir. 1977).

In *Microsoft Corp. v. United States,* 530 U.S. 1301 (2000), Chief Justice Rehnquist declined the invitation to disqualify himself under Section 455(a) even though his son was a partner in a law firm whose clients include Microsoft. Explaining that his son's personal and financial concerns were not affected by the decision in the pending litigation, Chief Justice Rehnquist stated that he "[does] not believe that a well-informed individual would conclude that an appearance of impropriety exists simply because [his] son represents, in another case, a party that is also a party to litigation in [the Supreme] Court." *Id.* at 1301.

To require recusal under Section 455(a) or 455(b)(1), the bias or prejudice of a judge must stem from an "extrajudicial source." *Liteky,* 510 U.S. at 555. The alleged bias or prejudice must be personal; "it must derive from something other than that which the judge learned by participating in the case." *Jaffe v. Grant,* 793 F.2d 1182, 1189 (11th Cir.1986). Unless the conduct reflects a "deep seated

favoritism or antagonism that would make fair judgment impossible, . . . [s]trongly stated judicial views rooted in the record, a stern and short-tempered judge's efforts at courtroom administration, expressions of impatience, annoyance and even anger directed to an attorney or party should not be confused with judicial bias." Committee Advisory Opinion No. 66.

Where the judge in a proceeding has a business relationship with counsel for a party to the proceeding, the judge's impartiality is reasonably questionable under Section 455(a). *Potashnick v. Port City Constr. Co.,* 609 F.2d 1101, 1110-1113 (11th Cir.1980). However, a judge's non-business relationship with counsel for a party and possible witnesses does not necessarily destroy his impartiality under Section 455(a). *Blalock v. United States,* 844 F.2d 1546,1552 (11th Cir.1988) (involving a judge's favorable relationship with the prosecutor and FBI agents).

In re United States, 666 F.2d 690 (1st Cir.1981) was an effort by a United States Attorney to mandamus a district judge to disqualify himself in a criminal case. There, the judge had been legal counsel to the governor before assuming the bench. The defendant, a former state senator, had been very helpful to the governor in a legislative investigation in which the judge had allegedly been involved as legal counsel. The judge denied any involvement in the matter or any interaction with the defendant. After a barrage of critical newspaper articles, the prosecutor initiated an FBI investigation, which did not confirm the media reports. In holding that the judge properly denied the recusal motion under Section 455(a), the Court of Appeals wrote:

> [An] obvious policy is that **a judge once having drawn a case should not recuse himself on unsupported, irrational, or highly tenuous speculation:** were he or she to do so, the price of maintaining the purity of appearance would be the power of litigants or third parties to exercise a negative veto over the assignment of judges.
>
> Although public confidence may be as much shaken by publicized inferences of bias that are false as by those that are true, **a judge considering whether to disqualify himself must ignore rumors, innuendos, and erroneous information published as fact in the newspapers**. . . . To find otherwise would allow an irresponsible, vindictive or self-interested press informant and/or an irresponsible, misinformed or careless reporter to control the choice of judge. . . . Were less required, a judge could abdicate in difficult cases at the mere sound of controversy or a litigant could avoid adverse decisions by alleging the slightest of factual bases for bias. . . . This restricted mandate to disqualify is calculated to induce a judge to tread the narrow path between timidity and tenacity.

In re United States, 666 F.2d at 694, 695 (emphasis added). This case was cited approvingly by our predecessor circuit in *Phillips v. Joint Legislative Com.,* 627 F.2d 1014 (5th Cir.1981) (Unit A).

D. ANALYSIS

No reasonable person would question my impartiality in this case because of my daughter's former relationship with the Maynard Cooper law firm. *First,* she has had no relationship to the Maynard Cooper law firm since the

indictment in this case. *Second,* she is not my dependent and does not live in my household. *Third,* she was only an associate in the law firm when it was appointed by Alabama Attorney General Bill Pryor to represent state agencies in the *Crum* litigation.

A reasonable person, knowing all the facts, would not infer bias on my part against investigative agents and officers of the United States. *First,* the only inference to reasonably be drawn from the fact of the Los Angeles grand jury investigation is that all suspicions concerning my knowledge or participation in my sister's criminality were abundantly unfounded. *Second,* no bias against federal agents can reasonably be inferred from the mere fact that I was served with a subpoena during that investigation, or that I indicated time differential levels of confidence in Los Angeles FBI agents. *Third,* a reasonable person would not infer impartiality when no complaints of hostility have been lodged by federal law enforcement officials in the past eight years I have interacted with them in the performance of our respective duties.

Of course, my conduct at the hearing on the motion to disqualify Defendant Siegelman's counsel was quintessentially *not* "extrajudicial," nor out of the ordinary, nor reserved only for attorneys representing the USA.

Finally, no reasonable person would question my impartiality in this case based on the fact that a lawyer who represented me eight years ago now represents one of the USA's cooperating witnesses. Moreover, no reasonable person would infer partiality from the fact that one of my friends had a business transaction with the father of that same lawyer's partner over fourteen years ago.

A reasonable person would not entertain doubts concerning my impartiality based on writings in *The Birmingham News.* That newspaper simply cannot create, by its own untrue and misleading reports, an otherwise non-existent disqualifying appearance of impropriety. As our Circuit has written:

> To the extent the doubts [concerning the judge] were created by representatives of the press shown not to be grounded in fact, they cannot require disqualification. The mere fact that the issue of disqualification of Judge Clemon has drawn the attention of the media, resulting in extensive coverage is not, in itself, a good reason [for disqualification].

Greenough, 782 F.2d at 1558, 1559, *citing United States v. State of Alabama,* 582 F. Supp. 1197, 1208 (N.D. Ala. 1984).

This year, for the first time in the history of the Northern District of Alabama, the United States Attorney for this district has insisted on the disqualification of a judge in a criminal case. Not only has she insisted on the disqualification of one district judge, she has insisted on the disqualification of three of the eight active judges of the court. She takes the position that the impartiality of every federal judge in this state to hear this case is reasonably questionable under Section 455(a). The proposition is, on its face, remarkable indeed.

The USA's first disqualification of certain judges efforts commenced on April 13, 2004, in *United States v. Woodward,* No. CR 00-J-213-S (N.D. Ala. 2000). (Doc. 278, Mem. Op. and Order of Recusal.) USA Martin's unsworn affidavit, *inter alia,* effected the disqualification of Judge

Inge Johnson in that case and the Judge's self-imposed disqualification in other Government cases "until a decent cooling off period has passed." (*Id.* at p. 2.) Judge Johnson was concerned that "[t]he Government and its agencies that are represented by the U.S. Attorney should not be forced to try cases before a judge who has been slandered by the U.S. Attorney." (*Id.*)

After Judge Karon O. Bowdre disqualified herself in the instant case, it was assigned to Judge C. Lynwood Smith. The USA insisted on Judge Smith recusal's on the principal basis of his "distant relationship," i.e., second cousin, to the non-party Governor who will not be called as a witness in this case. (Doc. 43, Tr. of Telephone Conf. at p. 7.) Although Judge Smith found no facts to warrant his disqualification, he nonetheless recused to promote "confidence in the institutional integrity of the judicial branch." (Doc. 54, Order and Mem. Op. at pp. 10-11.)

This case was then re-assigned to Judge L. Scott Coogler, whose ties to the Defendant Bobo and witnesses in this case are outstanding. Bobo is the pediatrician for the judge's children. Six years ago, Dr. Bobo and other persons and/or companies associated with him contributed more than $16,500 to the judge's judicial campaign through a political action Committee ("TuscoPac"). Dr. Karl Harbin, a partner of Dr. Bobo and a witness for the USA, contributed to TuscoPac; so did Boolas J. Boohaker, an unindicted co-conspirator and a USA witness. Norman Estes, a USA witness, contributed money directly to the Judge's campaign in 1998. Mike Echols, owner of a CPA firm (which employs the Judge's wife) housed in a building partially owned by the judge, is the treasurer of TuscoPac. (Doc. 63, Mot. to Recuse.) The USA voiced no objection to Judge Coogler's assignment to the case; and the USA

silently and implicitly declined the invitation by Defendant's counsel to join in their motion to recuse Judge Coogler.

In stark contrast, now the USA seeks my disqualification on alleged "ties" far more indirect and remote than those of Judge Coogler.

The USA's inconsistent disqualification standardsfor different judges of this Court, has created the ugly appearance of judge-shopping. Confidence in the institutional integrity of the judicial branch would be significantly eroded if we, as judges, facilitated this now – transparent effort by the United States Attorney to dictate which judge will (or will not) hear the criminal cases filed in this District. Although recusal is for me personally, the smoother road, it is the road not to be taken here – for there is an appalling dearth of facts which would cause a reasonable lay person to doubt my impartiality.

Although a moot issue, I must briefly address the USA's motion, echoing demands by *The Birmingham News,* to assign this case to a federal judge outside the State of Alabama. The motion has no legal basis whatever. The media may be confused over how our system works; but the USA should know better after three years in her position. A federal judge – even a chief judge – cannot simultaneously disqualify himself and assign the case to a judge outside his district because the random assignment of judges to cases is a hallmark of our system of federal court administration. If a judge is disqualified from a case, then the case is randomly assigned to another judge of the court until all eligible judges have been disqualified. Only then is the chief district judge empowered to request the chief circuit judge to assign a judge from outside the district.

Because, by the grace of God, truth is the currency of the courts of this great nation; and because, in the illuminating and redeeming light of truth, no reasonable person would harbor doubts concerning my impartiality, the United States Attorney's recusal motion must be **DENIED** in its entirety.

Done this 30th day of August, 2004.

/s/ U.W. Clemon
Chief United States District Judge
U.W. Clemon

Attachment "A"

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	**Case Number CR 04-C-0200-W**
PHILLIP KELLEY BOBO, DON EUGENE SIEGELMAN, and PAUL MICHAEL HAMRICK,	)	
Defendants.	)	

JUDICIAL NOTICE

(Filed Jul. 16, 2004)

Pursuant to his independent duty to disqualify himself in any proceeding in which his impartiality might reasonably be questioned, and in view of certain erroneous media reports concerning alleged "political ties" between

himself and one of the Defendants, this Judge hereby NOTICES the following adjudicative facts.

1. Over a quarter century ago, when I was twice elected to the Alabama State Senate, the Democratic Party was the only viable political party for statewide office in the State of Alabama. Success in the Democratic primary for Alabama house and senate districts was tantamount to election. Like most of my colleagues in the Alabama State Senate, I never faced Republican opposition.

2. The late (Eleventh Circuit Judge) Robert S. Vance was the Chairman and Don Siegelman was the Executive Director of the Alabama Democratic Party at some point during my political career. I have never held office in the Alabama Democratic Party nor was I a member of its inner circle.

3. I never consulted with Don Siegelman or sought his advice, support, or financial contributions during my political years. He never offered or gave me any advice, support, or financial contributions during those years. He never enlisted my support or sponsorship of, or for, anything on his behalf or on behalf of anyone else. To the best of my recollection, I never had a substantive conversation with him while I was a Senator.

4. I have been a United States District Judge for the last twenty-four years. During the entirety of that period, I have not had political ties or connections to or with any individual.

5. My daughter, Addine Michelle Clemon, has never been a partner in any law firm. Upon her graduation from Columbia Law School in 1999, she accepted employment as an associate, *i.e.*, a salaried employee, with the Birmingham

law firm of Maynard, Cooper & Gale, P.C. She remained an associate in that firm until April 2004.

6. When my aforesaid daughter made a $100 contribution to Don Siegelman's gubernatorial race in 2002, she was neither my dependent nor a member of my household.

7. One of the first cases over which I presided as a federal judge involved Don Siegelman as the lead defendant. I ruled against him. *See Whig Party of Alabama v. Don Siegelman,* 500 F. Supp. 1195 (N.D Ala. 1980). Since that time, I have presided over numerous cases in which Don Siegelman was a party. *See, e.g., McKee v. James* (N.D. Ala. CV:97-C-2078-W); *Allen v. Siegelman* (N.D. Ala. CV:99-C-366-NE); *Africa v. Waggoner* (N.D. Ala. CV:98-C-1891-S); *Hawthorne v. Siegelman* (N.D. Ala. CV:00-C-100-S); *Forbes-Bey v. Siegelman* (N.D. Ala. CV:01-C-579-S); *Patton v. Siegelman,* (N.D. Ala. CV:01-C-960-S).

8. No one, in any of the cases over which I have presided and in which Don Siegelman was either a party or counsel, has ever raised the recusal issue with respect to any alleged political ties between Don Siegelman and me.

The Court will set down for hearing any objection by any party to the propriety of this Judicial Notice and/or to the tenor of the matters noticed. Such objection shall be filed not later than Friday, July 23, 2004, at 4:30 p.m. *See* Federal Rule of Evidence 201.

Done this 16th day of July, 2004.

/s/ U.W. Clemon
Chief United States District Judge
U.W. Clemon

ATTACHMENT "B"

"MEMORANDUM OPINION GRANTING MOTION TO DISQUALIFY DOUGLAS JONES AND THE LAW FIRM OF WHATLEY DRAKE" (DOCUMENT 149 AT FOOTNOTE 1)

On February 14, 1995, this judge was notified that he was the subject of a grand jury investigation in the Central District of California involving an independent study program founded and operated by his sister. The program was housed in buildings rented from this judge; and he had made several personal loans to his sister for the operation of the program. On the same day as he was notified of the investigation, this judge spontaneously disqualified himself from all cases in which the United States was a party. He remained disqualified until notified by the United States Attorney for the Central District of California that the investigation had been closed.

This judge retained the nationally known law firm of Munger Tolles & Olson of Los Angeles, California and former Alabama Attorney General William Baxley to represent him. These were his only lawyers during the course of the 15-month investigation.

Ronald M. Olson, Brad D. Brian, Bart H. Williams, and Stuart N. Senator of Munger Tolles & Olson submitted to the United States Attorney for the Central District of California on May 1, 1996, a "Report Regarding Criminal Grand Jury Investigation of the Honorable U.W. Clemon." Two weeks later, on May 14, 1996, waiving his privilege against self-incrimination, this judge submitted to a full day of interrogation by federal prosecutors of the Central District of California. A week thereafter, on May 21, 1996, United States Attorney for the Central District of

California Nora M. Manella notified this judge's attorney Ronald Olson that the investigation had been closed.

During the course of the investigation, the Citizens Coalition of Jefferson County, Alabama, commenced its own investigation of the federal investigation. To the knowledge of this judge, only three lawyers were involved in the investigation and preparation of the Citizens Coalition report: Donald V. Watkins, H. Lewis Gillis of the firm of Thomas, Means & Gills, and Sam Heldman of the firm of Cooper, Mitch, Crawford, Keykendall & Whatley.

Since May 21, 1996, this judge has handled hundreds of civil and criminal cases in which the United States was a party. The United States has never moved to disqualify this judge in any of those cases. In point of fact, in his twenty-four years on the bench, the United States has never filed a motion to disqualify this judge in any case, including the present one.

This judge was unanimously confirmed by the United States Senate in 1980.

ATTACHMENT "C"

The Birmingham News/SATURDAY/Birmingham Post-Herald

[LOGO] Birmingham Post-Herald INSIGHT

Siegelman trial should move . . . somewhere

[Picture Omitted In Printing]

ELAINE WITT Commentary

In the 1993 film "Six Degrees of Separation," Stockard Channing's character, Ouisa Kittredge, asserts that anyone

on Earth can be linked to anyone else by no more than six degrees of interaction or relation.

Thus, for example, you might be connected to President Bush by five degrees if your former boss married a woman whose brother once cut hair in the president's favorite Texas barbershop.

You might be similarly connected to Bush's Democratic rival, U.S. Sen. John Kerry, if your son had a friend whose sister once waited tables at a Boston sandwich shop favored by Kerry.

In this context, it's possible to make sense of U.S. Attorney Alice Martin's arguments for the disqualification of the latest judge to be assigned to hear the fraud and bid-rigging case of former Gov. Don Siegelman and two co-defendants.

Real or perceived conflicts of interest, especially in something as grave and important as a government corruption trial, should never be ignored.

On the other hand, if we trace conflicts of interest to the infinite degrees that Martin has suggested in various court filings, we may have to ask not only whether it's possible to find a federal judge in Alabama qualified to preside over the Siegelman case but whether it is possible to find 12 qualified jurors.

After all, federal jury lists are drawn directly from local voter rolls. Thus, it's conceivable that most potential jurors in the pool have voted either for or against Siegelman in at least one of his seven runs for public office.

There are many ways to look at Martin's various motions alleging conflicts of interest among the judges consecutively assigned to the case.

One interesting factor to consider is the political affiliations of the various judges before they were appointed to the federal bench. Judges are obliged to abandon all political activity when they are appointed to the federal bench, but no one gets a federal judgeship without ties to whichever party controls the White House at the time of appointment. Partisan concerns likewise factor into the appointment of U.S. attorneys.

The first federal judge assigned to the case, Republican Karon Bowdre, stepped down from the case before either side could object to her hearing it. Bowdre's lawyer husband had represented a company that was a losing bidder for the Medicaid contract that is a key issue in the case.

The second judge, Lynwood Smith, is a Democrat. Martin, a Republican, objected to his hearing the Siegelman case because he is related to Gov. Bob Riley, a Republican who defeated Democrat Siegelman in the 2002 governor's race. Based on Smith's relationship to Riley (the judge also had once attended a Riley fund-raiser), it might seem that if either side should have objected to Smith hearing the case it might have been Siegelman's lawyers, but they did not.

Logic suggests that both sides considered political affiliation, or some other factor, more important than Smith's relationship to Riley.

The third judge appointed, L. Scott Coogler, stepped aside after Siegelman's attorneys noted that Siegelman

co-defendant Dr. Phillip Bobo – whose interests could conflict with Siegelman's in the case – owned a medical clinic at which Coogler's children had been treated. Despite this remarkably direct connection – only one or two degrees of separation, as it were – Martin did not object to Coogler, a Republican, hearing the case.

Things get more complicated when you come to Martin's objections to U.S. District Judge U.W. Clemon, a Democratic appointee currently assigned to the case. In the case of Clemon, the alleged conflicts cover so much ground that, if found to be legitimate, they could make it difficult for any well-connected lawyer to become an effective federal judge.

For example, Martin has complained that Clemon should not hear the case because his daughter once worked for a law firm with ties to Siegelman. By this logic, it's conceivable that any lawyers with close kin in the legal profession would be overwhelmed with conflicts if they became judges. And if parties didn't want their cases heard by certain judges, they could simply hire relatives of the judges they wished to disqualify.

Likewise, the government contends that because Clemon was once investigated – but never charged – by a federal prosecutor in California, he is biased against Martin's office. By this logic, if prosecutors wished to disqualify certain judges from hearing criminal cases in their districts, they could launch, and subsequently drop, cursory criminal investigations against the judges.

The little-spoken truth is that everyone is biased about something. Prosecutors, whatever their political affiliation, know that some judges tend to be more sympathetic to prosecutors and others tend to be pro-defense.

The same is true in civil cases, with certain judges generally considered more pro-plaintiff and others considered pro-defense.

Most lawyers would like to get a sympathetic judge on every case, but they can't use general suppositions about a judge's leanings to have him *or* her disqualified.

Actual conflicts of interest generally are defined as direct and specific connections between a judge and a party in a case.

It's hard to say what judge – Clemon or, as Martin has suggested, a judge from another state – will ultimately hear the charges against Siegelman and his two codefendants.

Based on some of the documents that have been filed in court in recent weeks, perhaps the simplest solution would be to proactively move the trial to Nebraska and pick a judge, jury and maybe even a prosecutor from there – except that Siegelman once was a trustee of the University of Alabama, which during his term played football against the University of Oklahoma, which, of course, is in the same conference as the Nebraska Cornhuskers. Darn.

Case. No.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

IN RE UNITED STATES OF AMERICA,
Petitioner.

PETITION BY THE UNITED STATES OF AMERICA FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, THE HONORABLE U.W. CLEMON, CHIEF JUDGE, PRESIDING

Comes now the United States of America ("the Government"), by and through the United States Attorney for the Northern District of Alabama, and petitions this Court for a writ of mandamus to the Honorable U.W. Clemon, Chief Judge of the United States District Court for the Northern District of Alabama.

Relief Sought

The Government petitions for a writ directing the district court to recuse from presiding in case number CR-04-C-200-W, *United States of America v. Phillip Kelley Bobo, Don Eugene Siegelman, and Paul Michael Hamrick.*

Issue Presented

Did the district court abuse its discretion by denying the Government's Motion to Recuse?

Jurisdiction

This Court has jurisdiction to issue a writ of mandamus to the district court pursuant to 28 U.S.C. § 1651. *See also* Fed.R.App.P.21.

Relevant Facts

A. Procedural History

The Grand Jury returned the indictment in this case on May 27, 2004. The general allegations are conspiracy, health-care fraud, and federal program fraud[1] by Dr. Philip Bobo, a physician; Don Eugene Siegelman, the former Governor of the State of Alabama from 1999 to 2003; and Paul Michael Hamrick, the former governor's Chief of Staff.

Initially, this case was randomly assigned to the Honorable Karon Bowdre who immediately notified the clerk of the court that she was recusing herself from the matter. *See* Record Excerpt ("R. Ex.") 2. The case was randomly reassigned to the Honorable C. Lynwood Smith.

Judge Smith advised the parties that he was a second cousin of Governor Bob Riley, the current Governor of the State of Alabama who defeated Defendant Siegelman during his re-election bid in 2002. Judge Smith had also attended a fundraiser for Governor Riley in 2002. *See* R. Ex. 165 at exh. 3. A great deal of media attention was drawn to Judge Smith's relationship to Governor Riley. The Government verbally expressed concern about public confidence in the judicial process if

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[1] By an order entered on September 18, 2004, the district court dismissed the count of the indictment that charged public program fraud. R. Ex. 224.

Judge Smith continued to preside over the case, and Judge Smith subsequently issued his order of recusal on June 30, 2004 stating:

> To refrain from participation in a case of significant import to the entire State when such action would be tantamount to inflicting a wound upon a fundamentally important trust is the essence of restraint required of Article III judges, appointed for life during good behavior – and so appointed *precisely* for the purposes of ensuring equal justice under law and sustaining public confidence in the integrity and impartiality of the judicial branch.

R. Ex. 54 at 12; *see also* R. Ex. 165 at exh. 6.

The case was then randomly reassigned to the Honorable L. Scott Coogler on July 1, 2004. *See* R. Ex. 55; R. Ex. 165 at exh. 7. Judge Coogler advised the parties that his children had been treated at a medical clinic owned by Dr. Bobo. Judge Coogler also advised that during his 2002 state judicial campaign in Tuscaloosa County, he had received a political action committee ("PAC") contribution from TUSCO PAC, a PAC to which Defendant Bobo had contributed. *See* R. Ex. 165 at exh. 8. Defendant Siegelman filed a Motion to Recuse Judge Coogler, citing his children's medical treatment and the campaign contributions to TUSCO PAC by Defendant Bobo and potential witnesses in the case. *See* R. Ex. 63. Defendant Siegelman maintained that "[g]iven the facts outlined herein, many, in fact most, informed people would 'reasonably question' Judge Coogler's impartiality." *Id.* at 4; *see also* R. Ex. 165 at exh. 10.

Thereafter Judge Coogler issued an Order of recusal. *See* R. Ex. 65. Citing the recusal statute, Judge Coogler emphasized that

> [t]his judge has no such bias or prejudice and has no doubt that he would be fair and unbiased in this case. However, actual bias is not the only factor that must be weighed in making this decision. . . . Thus it is not the impartiality of the judge alone that is determinative, but also how it appears to a reasonable person who is informed of all the facts. . . . [P]ublic trust and confidence in our system of justice is maintained by judges not only being fair and unbiased, but also having the appearance of it as well.

Id. at 2. Following Judge Coogler's recusal, this case was randomly assigned to its fourth judge, the Honorable U.W. Clemon, on July 13, 2004. *See* R. Ex. 66; R. Ex. 165 at exh. 12.

B. Chief Judge Clemon Responds to Media Reports of Potential Bias

On July 16, 2004, three days after the case had been assigned to him, Chief Judge Clemon, *sua sponte*, issued an order taking judicial notice of several facts "[p]ursuant to his independent duty to disqualify himself in any proceeding in which his impartiality might reasonably be questioned, and in view of certain erroneous media reports concerning alleged 'political ties' between himself and one of the Defendants." *See* R. Ex. 68. The Judge addressed his connections to the Alabama Democratic party and Defendant Siegelman, as well as his daughter's prior association with the Birmingham law firm of Maynard, Cooper &

Gale, P.C. and her $100 contribution to Defendant Siegelman's 2002 gubernatorial campaign.

Over the next two weeks, the parties filed a number of pretrial motions concerning the indictment and the admissibility of evidence at trial. In addition to these motions, the Government sought to have attorney Robert Segall disqualified from representing Defendant Don Siegelman because Mr. Segall had testified in the previous trial of co-defendant Dr. Philip Bobo, and Mr. Segall had represented the State of Alabama in responding to criminal subpoenas concerning the Medicaid program at issue in the case. The Government also sought to have attorney G. Douglas Jones disqualified from representing Defendant Siegelman because Mr. Jones was the U.S. Attorney for the Northern District of Alabama during the pendency of the criminal investigation.

Appearing on behalf of the United States at the July 28, 2004 hearing to argue the Motion to Disqualify Doug Jones was Ms. Stacey Ludwig of the Professional Responsibility Advisory Office from the United States Department of Justice. *See* R. Ex. 152. The Court at various points sustained objections to Ms. Ludwig's questions that had not been made by counsel for Doug Jones, *id.* at 77:21-24, 89:5, 90:4-16, 118:14-24, and questioned witnesses extensively, not only about facts related to disqualification, but also about the evidence and legal theories underlying the prosecution, *id.* at 108:12-111:21, 154:22-156:22. 173:18-175:11. The hearing had contentious moments as Ms. Ludwig attempted to make a record of the Government's position, *id.* at 113:4-114:14, and the tension peaked when the Court directed the Marshal to take Ms. Ludwig into custody at the next recess because she had attempted to make an objection to the Court's question of

a witness, *id.* at 173:18-174:6. After that witness' testimony had concluded, Ms. Ludwig apologized to the Court. *Id.* at 180:17-181:11. Throughout the hearing the Judge emphasized in his questioning of witnesses and in his comments from the bench that Doug Jones' involvement in the criminal investigation was minimal and that any information discussed with Doug Jones was presented during the first trial of Dr. Bobo. *Id.* at 62:4-63:3, 72:11-73:2. 172:18-173:9, 242:21-244:24. The Court did not rule during the hearing.

After the hearing, there were media reports concerning the Court's connection to Doug Jones and his law firm, Whatley Drake LLC. *See* R. Ex. 175 at exh. 26. The Birmingham News reported that Jack Drake, one of Siegelman's defense lawyers and a named partner of Whatley Drake, LLC, had previously been a shareholder of Cooper, Mitch, Crawford, Kuykendall & Whatley in 1996 when that firm had helped defend Chief Judge Clemon, who was then the target of a federal criminal investigation in the Central District of California. Joe Whatley, formerly of Cooper, Mitch and currently of Whatley Drake, had been retained by the Jefferson County Citizens Coalition to write a report that was submitted to officials in the U.S. Department of Justice to persuade the Government not to prosecute Chief Judge Clemon. *Id.*

Two days after the August 2 news report, Chief Judge Clemon entered an order and memorandum opinion disqualifying Doug Jones. *See* R. Exs. 149 & 150. The Court wrote:

> Before addressing the merits of the Government's motion, it is appropriate for this judge to put on the record the relevant facts concerning his prior relationship *vel non* to the Whatley

> Drake law firm. That relationship can be summed up in one word: "None." Neither the Whatley Drake law firm (which did not exist in April 1996), nor any one of its individual members, has ever represented this judge in any matter.

R. Ex. 150 at 1-2. Following that sentence was a four paragraph footnote in which the Court set forth its recitation of the facts for the period in which Chief Judge Clemon was the target of a federal criminal investigation in the Central District of California. The Court explained that when Chief Judge Clemon was notified that he was the "subject" of an investigation of criminal wrongdoing by his sister, he immediately disqualified himself from all cases in which the United States was a party and retained Munger Tolles & Olson and William Baxley to represent him. The Court also noted that "in his twenty-four years on the bench, the United States has never filed a motion to disqualify this judge in any case." *Ibid.*

C. The Government Files a Motion for Recusal

On August 16, 2004, barely one month after the case was assigned to Chief Judge Clemon, the Government filed a motion requesting that the Court recuse itself from this case. *See* R. Ex. 165.

The Motion *first* asserted that Chief Judge Clemon had expressed bias against investigative agents and officers of the United States arising out of his own extra-judicial experience as the target of a federal criminal investigation, specifically against an FBI agent who investigated the Judge and served subpoenas on the Judge and the Judge's church, who is now a member of the task

force that investigated this case and may be called as a witness at trial. *Id.* at 10-13. The Motion explained that in 1995 and 1996, Chief Judge Clemon's sister, Ms. Arnese Clemon, was a target of a federal criminal investigation of public program fraud and money laundering involving the Los Angeles Unified School District in California. Ms. Clemon ultimately pleaded guilty to felony violations and was sentenced to a term of imprisonment in a federal correctional facility. Chief Judge Clemon was notified by the United States Attorney's Office for the Central District of California that he was also a "target" of that investigation and that prosecutors were determining whether to seek a grand jury indictment of the Judge for, among other things, mail fraud, program fraud, and money laundering.

In response, the Jefferson County Citizens Coalition ("JCCC"), a political organization from the State of Alabama of which the Judge was a member prior to taking the bench, mobilized to his defense. *See* R. Ex. 165 at Exh. 18 ("JCCC Report"); *see also* R. Ex. 218 at exh. 1 & 2. The JCCC established a bank account to receive contributions for the effort. *See* R. Ex. 165 at Exh. 18, App. A at 4. Chief Judge Clemon offered his knowledge and assistance for the Report, granting "extensive and repeated interviews" to counsel for the JCCC. R. Ex. 165 at exh. 18 at 9. After conducting "an extensive assessment and investigation of the federal probe involving Judge Clemon, and [] review[ing] voluminous documents, interview[ing] numerous witnesses, and otherwise thoroughly review[ing] the matter," the JCCC adopted the Report and renewed its support of the Judge. R. Ex. 165 at exh. 18, App. B at 1.

During the course of the criminal investigation, Chief Judge Clemon, his counsel, and the JCCC alleged misconduct on the part of agents involved in the investigation.

See R. Ex. 165 at exh. 18 at 49, 67-70. The Report charged "improperly motivated federal prosecutorial and investigatory misconduct," and "misuses and abuse of prosecutorial and investigatory authority." *Id.* at 64, 65. The Report cited specifically "the unlawful seizure by a federal agent in Birmingham of church records and privileged correspondence between Judge Clemon and his counsel." *Id.* at 49. The Report claimed that the manner of the seizure was "particularly unconscionable," *id.* at 68, and that the agents "intimidated" church members, *id.* at 69. Chief Judge Clemon lodged "protests regarding the improper treatment of his church and its members, and regarding the seizure of privileged documents." *Id.* at 69-70. The Report concluded: "The federal investigation into these matters has been characterized by overreaching and abuse by prosecutors and investigators of the United States government." *Id.* at 76.

One of the federal agents who served the subpoena at Chief Judge Clemon's church that was the subject of complaint, and who served a subpoena on the Judge personally, is currently assigned to the Joint Public Corruption Task force ("JPCTF") of the Northern District of Alabama. As part of the JPCTF, the agent has investigated Defendant Siegelman and his co-defendants in this case, gathered evidence, and is a potential trial witness. Moreover, Chief Judge Clemon has expressed on more than one occasion his distrust of federal agents, gained as a result of his personal, extrajudicial experience as the target of a federal criminal investigation that he, and others on his behalf, claimed was conducted by the government in bad faith. *See* R. Ex. 165 at exh. 22; R. Ex. 165 at exh. 23; R. Ex. 165 at exh. 18 at 76; R. Ex. 165 at exh. 18, App. A at 2. The Government argued that under the

circumstances, an average layperson would easily doubt Chief Judge Clemon's impartiality to hear evidence gathered or presented by that very agent.

Second, the Motion to Recuse also asserted that Chief Judge Clemon has close ties to Defendant Siegelman, including financial benefits conferred by Defendant Siegelman on the Judge's daughter. *Third*, the Motion asserted that Chief Judge Clemon has had a direct financial connection to Mr. William Baxley, who provided legal services for the Judge during that criminal investigation of public program fraud, and who now represents a key unindicted coconspirator in this case. R. Ex. 165 at 14-15. *Finally*, in the alternative to immediate recusal, the Government sought discovery concerning (i) the work performed by Chief Judge Clemon's daughter for the State; (ii) the list of contributors to the JCCC defense fund – whose contributions link them financially to Chief Judge Clemon – to determine if these contributors are among the defendants, witnesses, or counsel in this case; and (iii) whether any counsel involved with the JCCC Report or the defense of the Chief Judge had any involvement in this case. *Id.* ¶ 35. The government noted that because Chief Judge Clemon would become the fourth judge to recuse from the case, it would be appropriate to consider case reassignment outside the State pursuant to 28 U.S.C. § 292(b). *Id.* ¶¶ 36-37.

The Government filed its Motion just after two o'clock in the afternoon on August 16. In less than two hours, the Court issued an Order setting a hearing on the Motion for the next morning at nine o'clock. *See* R. Ex. 166.

D. Court Holds a Hearing and Denies the Motion

At the hearing, the Court began by addressing his daughter's connection to Defendant Siegelman. *See* R. Ex. 170 at 4-19. The Court questioned Government counsel about Ms. Clemon's ties to Maynard, Cooper, and how that firm was hired by the State:

> THE COURT: And you're aware that my daughter worked in the labor and employment section of the Maynard, Cooper law firm?
>
> MR. HART: Your Honor, I was not aware of the particular section that she in with the Maynard, Cooper law firm. I knew they had a practice – you know, I knew that they had a practice of –
>
> THE COURT: You didn't make an effort to find out what section she worked in?
>
> MR. HART: No, Your Honor, I did not.
>
> THE COURT: All right.
>
> MR. HART: I know the attorney that she's worked with, and I know that's his area of practice, and I assume –
>
> THE COURT: And who is that?
>
> MR. HART: His first name is David, now I can't recall –
>
> THE COURT: David Smith?
>
> MR. HART: Yes, Your Honor.
>
> THE COURT: All right. Mr. Smith will be available to us by telephone today.

> Do you know who hired David Smith to represent the state of Alabama in the *Reynolds* case?
>
> MR. HART: I do not, your Honor. I assume he was hired – I believe he was hired earlier on in that case, but I don't know.
>
> THE COURT: . . . I have asked my law clerk to have Mr. Smith available for a phone conversation this morning. . . . [W]e'll retire to my chambers where we'll place a call to Mr. Smith to find out who hired him.

Id. at 6:17-7:22. Once Mr. Smith was reached by phone, the Court proceeded to question him. "I've got lawyers in the Bobo case in my chambers, and I wanted to ask you this question: Who engaged your services to represent the state of Alabama in the Highway Department litigation, *Reynolds versus Sims, Crum, et cetera*?" *Id.* at 9:18-22. Mr. Smith replied that Attorney General Bill Pryor had contacted him about getting involved in the case and "is the one who then formally engaged me and our firm to enter an appearance in that case." *Id.* at 9:25-10:1.

Counsel for the Government attempted to question Mr. Smith further about how he was hired and what he knew about the involvement of Governor Siegelman's office. Counsel for the Government also attempted to determine how Ms. Clemon's work on the *Crum* case might have benefited her as an associate with respect to bonuses, performance reviews, and the like. The Court interrupted and terminated the questioning saying "I think that we've established what was the subject of this inquiry; and that is, who hired this law firm." *Id.* at 13:17-19.

The Court next considered the Government's contention that the Court had previously complained about, and expressed bias against, members of law enforcement, particularly the conduct of an agent who served subpoenas during the Central District of California investigation and was now an agent in the current case against Defendants Bobo, Hamrick, and Siegelman. *Id.* at 19-41. The Government made clear that it was not seeking the Judge's recusal in every case in which the United States is a party, or even in every criminal case, but only in this case because of the circumstances, including the involvement of an agent about which the Court had complained in the past. *Id.* at 19-20.

The Government quoted the record of an interview the Judge provided to a Special Agent in California where the Court stated "I don't have the confidence I once had in FBI and IRS agents." *Id.* at 25. The Court conceded that it had "concern, disgust, agitation, irritation" with the investigation, but stated that those feelings were aimed at the U.S. Attorney's office for the Central District of California, "and the way that they were conducting what was ostensibly a California investigation in Alabama." *Id.* at 27:14-15. The Government responded "you and your representatives were also specifically displeased with the conduct of FBI agents here in the Northern District of Alabama as it related to serving that subpoena at the church, and expressed that to – to people in the U.S. Attorney's Office in the Central District of California." *Id.* at 27:23-28:3. The Court later stated "there are, in my judgment, good and bad lawyers, judges, FBI agents . . . " *Id.* at 28:17-18. The Government responded "you, the Court, and your representatives felt that some of these bad FBI agents were

involved in the investigation of the Court and Ms. Arnese Clemon. . . . [and] one of those agents is involved in this case." *Id.* at 28:22-25. The Government emphasized that it had never previously sought the Judge's recusal in a case because there had not been a case involving the same agent until now. *Id.* at 41:13-18.

Finally, the Court turned to the contention that he has a direct financial connection to Mr. William Baxley, who had provided legal services for the chief Judge during the criminal investigation of the Judge for public program fraud. The Court asked whether the Government was aware of any direct financial connection between the Court and Mr. Baxley, other than the legal representation. The Government explained that it was aware of another connection. *Id.* at 42:13-16.

The Court then explored Mr. Baxley's connection to the current case, specifically his representation of a key unindicted coconspirator. The Government explained that although that witness is currently cooperating,

> what would be the best outcome for an unindicted coconspirator who basically has the agreement that if they're truthful and testify and cooperate with the government, they won't be prosecuted; would not to be called a witness, for instance. That would be most helpful. And then somebody like Ms. Herring or any other unindicted coconspirator, wouldn't have to testify. She's a lobbyist today. And if the Court for instance were to say, I'm not going to hear your testimony, I find it incredible; or for any other reason strike her, that would be in the best interest of his client. That would be a win/win. *Id.* at 44:21-45:8.

The Court denied the motion from the bench, *id.* at 49:2-4, quoting at length from *United States v. Greenough*, 782 F.2d 1556 (11th Cir. 1986). The Court refused to allow the Government to distinguish *Greenough* on the record and denied the Government's oral motion for a stay of proceedings pending a challenge to the Court's ruling on recusal. *Id.* at 49:7-50:2.

E. The Government Files a Motion for Reconsideration

On August 25, 2004, the Government filed a Motion for Reconsideration. *See* R. Ex. 173. Concerning who hired the Maynard, Cooper law firm to represent the State of Alabama in connection with the litigation work that Chief Judge Clemon's daughter performed for the State, the Government presented letters it received from the Attorney General's Office that established that it was Governor Siegelman's office through Chief Legal Counsel Ted Hosp (a former partner of Maynard, Cooper), and not Attorney General Pryor, who made the decision to hire Maynard, Cooper. *Id.* (attaching a letter from Edward Hosp to Chief Deputy Attorney General Richard Allen dated Oct. 15, 1999 ("Dear Richard: As we discussed previously, please take the steps necessary to substitute David M. Smith for Roger Bates and his firm in the above referenced matter. If you have any questions, please do not hesitate to call.")). In a letter dated October 20, 1999, the Alabama Attorney General formally appointed David Smith to represent the State. *See id.* (attaching letter from Bill Pryor to David Smith dated Oct. 20, 1999).

The Government also distinguished the *Greenough* case, upon which the Court had relied, by explaining that,

in *Greenough*, the court of appeals concluded that there was no factual basis for recusal, whereas in this case the record has established the factual support for the Government's request. Finally, the Government also filed under seal information regarding the additional financial connection that Chief Judge Clemon has to Mr. Baxley. *See* R. Ex. 174.

F. Court Issues A Memorandum Opinion Denying the Motion

On August 30, 2004, the Court issued a Memorandum Opinion denying the Government's motion. *See* R. Ex. 179 ("corrected" at R. Ex. 183). Chief Judge Clemon reiterated his lack of relationship to Defendant Siegelman personally and through his daughter, and also contested the letters showing that Governor Siegelman made the decision to hire Maynard, Cooper. The Court asserted that the letter in which the Governor's chief legal counsel instructed the Deputy Attorney General to hire Maynard, Cooper, was not evidence that the Governor made the decision, but rather, "simply conveyed then Governor Siegelman's approval or concurrence in the Attorney General's decision to hire David Smith." *Id.* at 2 n.1. The Court relied heavily on the testimony of David Smith, whose availability to testify the Court had prearranged.

With respect to his bias towards investigative agents, specifically the agent who served the subpoena at his church in the Northern District of Alabama, the Court refused to acknowledge that he had ever complained about the events at the church or agents in Alabama. *Id.* ¶¶ 7-12. The Court's only mention of the JCCC was to state that he had never been a member of that organization. *Id.*

¶ 11.[2] The Court also flatly denied any statements attributed to him in the Form 302 report regarding the FBI's interview of the pastor of the Judge's church. *Id.* ¶ 9. The Court admitted, however, that its "confidence level in FBI agents was not the same." *Id.* at 3 n.2. With respect to William Baxley, the Court restated that they have no current financial relationship and that Mr. Baxley is not expected to appear in this case. *Id.* ¶¶ 13-17.

In the next section of the Memorandum Opinion, the Court turned its attention to the media, excoriating the Birmingham News for its coverage. *Id.* at 6-8. The Court then addressed the legal principles governing recusal. He concluded that a reasonable person could not question his impartiality in this case (i) based on his daughter's employment at Maynard, Cooper, and her political contribution to Governor Siegelman; (ii) based on his complaints about "Los Angeles FBI agents;" or (iii) based on the fact that a lawyer who once represented the Judge now represents a cooperating witness for the government. *Id.* at 11-12. He declared that the media could not "create, by its own untrue and misleading reports, an otherwise nonexistent disqualifying appearance of impropriety." *Id.* at 12.

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[2] The Court denied "AUSA Hart's allegation" that he was a member of the Jefferson County Citizens Coalition before he took the bench. But Chief Judge Clemon told the FBI during his interview for appointment to the federal bench that he was a "Member of the Citizens Coalition headed by Dr. R. ARRINGTON." R. Ex. 218 at exh. 1. Dr. Richard Arrington confirmed the membership. *See id.* at exh. 2, Interview of Dr. Richard Arrington, June 25, 1979 ("He knows that CLEMON is on the Board of Alabama Citizens for Responsible Public Television and is a member of the Citizens Coalition"). Dr. Arrington was listed as the Chairman of the Jefferson County Citizens Coalition on the cover of the JCCC Report. *See* R. Ex. 165 at exh. 18.

The Court then focused on the U.S. Attorney's requests for judicial recusal in the *Woodward/Jordan* case and in this case, and accused the office of "inconsistent disqualification standards" that have "created the ugly appearance of judge-shopping." *Id.* at 14. The Judge contrasted the bases for his recusal with those for Judge Coogler, maintaining that "Bobo is the pediatrician for the judge's children," and that "[s]ix years ago, Dr. Bobo and other persons and/or companies associated with him contributed more than $16,500 to the judge's judicial campaign through a political action committee ('Tusco-Pac')." *Id.* at 14.[3] The Court then chided the U.S. Attorney for seeking case reassignment to a judge outside the State of Alabama: "[i]f a judge is disqualified from a case, then the case is randomly reassigned to another judge of the court until all eligible judges have been disqualified. Only then is the chief district judge empowered to request the chief circuit judge to assign a judge from outside the district." *Id.* at 15.[4]

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[3] Judge Coogler put it differently. *See* R. Ex. 212 at 3:24-4:13 (referencing "emergicare" facilities "where people come by when they have problems without an appointment," the judge explained that on "three occasions . . . my children have gone to that particular clinic for strep throat or . . . some type of condition like that . . . My children, obviously, go to other doctors as well, and the choice of which particular facility to go to is . . . predominately determined by how quickly they can get in there and how many people are waiting in the waiting room"); *id.* at 6:15-23 ("I certainly got money from TUSCO PAC. I generally think I know where the funds came from . . . and I certainly didn't have any clue that Dr. Bobo had been the source of any of the funds.").

[4] The Government has not, and does not, "take[] the position that the impartiality of every federal judge in this state to hear this case is reasonably questionable under Section 455(a)." *Id.* at 13. In its Motion, the Government merely suggested that the Court consider 28 U.S.C.

(Continued on following page)

Reasons for Issuance of the Writ

I. Mandamus Standard and the Recusal Statute

A. Mandamus Availability and Standard of Review

A petition for writ of mandamus generally must show "(1) a clear right in the p[etitioner] to the relief sought; (2) a clear duty on the part of the [other party or the court] to do the act in question; and (3) no other adequate remedy available." *District Lodge No. 166, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. TWA Services, Inc.*, 731 F.2d 711, 717 (11th Cir. 1984). A judge's decision not to recuse is reviewed in this circuit for an abuse of discretion. *Jaffree v. Wallace*, 837 F.2d 1461, 1465 (11th Cir. 1988).

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§ 292(b), which provides that "[t]he chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit." With all due respect to Chief Judge Clemon, the Government remains unaware of a requirement that every single judge in a district must be disqualified before a case can be assigned outside the district. According to the docket sheet for the *Woodward/Jordan* case, of which this Court may take judicial notice, *see United States v. Rey*, 811 F.2d 1453, 1457 n.5 (11th Cir. 1987), only two judges recused themselves before that case was reassigned to the Honorable Lacey Collier of the Northern District of Florida. *See* Criminal Docket for Case # 00-CR-213-ALL, *United States v. Jordan, et al.* (attached hereto as Appendix A); *Notice of Reassignment* and *Designation of United States Judge for Service Within this Circuit*, entered May 11, 2004 in *United States v. Jordan*, et al., Case #00-CR-213-ALL (attached hereto as Appendix B). The Government of course was not privy to discussions within the District Court that might have taken place before Chief Judge Edmondson was consulted about the *Woodward/Jordan* case, but the docket for that case does not indicate that every single district court judge in the Northern District of Alabama (or in the State of Alabama for that matter) recused him – or herself before Judge Collier was designated.

B. Standard for Recusal Under 28 U.S.C. § 455(a)

The clear right to issuance of the writ in this case turns on whether Chief Judge Clemon abused his discretion in failing to recuse pursuant to 28 U.S.C. § 455, which states that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Section 455 creates for judges "an affirmative, self-enforcing obligation to recuse [themselves] *sua sponte* whenever the proper grounds exist." *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989). In evaluating whether to recuse, the judge must ask whether a "reasonable member of the public" familiar with all of the facts would entertain a significant doubt about his impartiality. *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989).

Section 455(a) embodies several important principles. *First*, Section 455(a) does not require the existence of *actual* bias or prejudice. Rather, an appearance of impartiality necessitates recusal. The Court must ask whether a reasonable person would entertain a "significant doubt" about the Judge's partiality, not whether the Judge would actually be biased, or whether such bias would change the outcome of the case. *See Torkington*, 874 F.2d at 1446; *United States v. State of Alabama*, 828 F.2d 1532, 1546 n.55 (11th Cir. 1987) ("It makes no difference how much practical effect the judge's recusal would have had on the outcome of the litigation. The purpose of the disqualification statute is to avoid even the appearance of impropriety; the appearance of impropriety is not lessened by the fact that the litigation would have come out the same way").

Second, when looking through the eyes of this reasonable person, the Court must be "mindful that an observer of our judicial system is less likely to credit judges' impartiality than the judiciary." *United States v. Jordan*, 49 F.3d 152, 157 (5th Cir. 1995). The man-on-the-street standard is critical because "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." *In re Kensington Int'l Ltd*, 368 F.3d 289, 302 (3rd Cir. 2004). Thus, a judge considering a motion for recusal must remember that it is the reasonable observer, not the reasonable judge, whose view governs the analysis.

Third, a judge considering a recusal motion should make his ruling in light of the totality of the circumstances. The court "need not decide whether any of the [] facts alone would . . . require [] disqualification," if the court "believe[s] that together they create an appearance of partiality that mandates disqualification." *In re School Asbestos Litigation*, 977 F.2d 764, 782 (3rd Cir. 1992). In the event of a close call, the judge must recuse. *Kelly*, 888 F.2d at 745; *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 1146 (2004). Indeed, Section 455 "liberalized greatly the scope of disqualification in the federal courts," *Murray v. Scott*, 253 F.3d 1308, 1310 (11th Cir. 2001), eliminated "the old 'duty to sit' doctrine," and replaced it with the requirement that "*judges [] resolve any doubts they may have in favor of disqualification*," *Kelly*, 888 F.2d at 744 (emphasis added). Application of this "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties. . . . But to perform its high function in the best way, justice must satisfy the appearance of justice."

In re Boston's Children First, 244 F.3d 164, 171 (1st Cir. 2001) (internal citations and quotation marks omitted).

The above principles are further informed in this case by the high profiles of the defendants, one of whom is a former Governor of the State of Alabama, and by the inordinate media attention garnered not only by the case, but also by the specific issue of judicial impartiality. Section 455(a)'s paramount purpose is to preserve public confidence in the integrity of the judiciary. On no occasion must the public's confidence in the judiciary be guarded more closely than in a case concerning the criminal culpability of a person who held the state's highest office at the time that he allegedly committed the charged criminal acts. Courts have recognized that the publicity afforded to a "high profile" case, and specifically to a particular judge's ability to preside impartially in the case, is a legitimate consideration in a recusal determination. *See United States v. Tucker*, 78 F.3d 1313, 1324-25 (8th Cir. 1996) (remanding to a different district judge to "insure the perception of impartiality" in a "high profile" case in which the judge's connections to certain persons had been "widely reported in the press"); *see also In re Boston's Children First*, 244 F.3d at 167 (considering in the disqualification analysis the "broad[] publici[ty]" received by the "issue of partiality"). When the litigation is complete, the public must not be left with even a hint of doubt that the judicial branch of government has acted impartially in the adjudication of this matter.

II. The District Court Abused Its Discretion By Refusing To Recuse From This Case Because, On This Record, An Average Layperson Could Easily Doubt And Reasonably Question The Judge's Impartiality

Although the above cases set forth the basic principles governing recusal, whether this Court will exercise its discretion to issue a writ depends on the record in this case. As the Fifth Circuit has explained, review of a denial of recusal is "extremely fact intensive and fact bound," and the analysis of a 455(a) claim "must be judged on its unique facts and circumstances more than by comparison to situations considered in prior jurisprudence." *Jordan*, 49 F.3d at 155; *see also United States v. Bremers*, 195 F.3d 221, 225 (5th Cir. 1999) ("the analysis of a particular section 455(a) claim must be guided . . . by an independent examination of the unique facts and circumstances of the particular claim at issue.").[5]

Such a review of the record here warrants the relief the Government has requested. The Government's Motion to Recuse, Motion for Reconsideration and sealed addendum thereto set forth clearly (with ample citations to

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[5] In two cases located from this Circuit concerning recusal, the court denied the petitions, but the facts were very dissimilar to the instant case. *See United States v. Gregory*, 656 F.2d 1132, 1136 (5th Cir. 1981) (denying petition for writ to disqualify judge where judge's comments made while disclosing his personal finances to the parties were "perhaps intemperate" but did not reflect personal or pervasive bias towards defendants); *In re Corrugated Container Antitrust Litig.*, 614 F.2d 958, 962 (5th Cir. 1980) (refusing to issue writ where legal duty of judge to disqualify was "nonexistent" based on fact that judge became familiar with facts while presiding over defendant's criminal trial before presiding over civil antitrust litigation; defendant could point to no extrajudicial source).

reliable records) the Court's expressed disgust, decreased confidence, and complaints against an agent who investigated the Judge for public program fraud, served subpoenas in that case, and is now an investigator and potential witness in this case, not to mention the other grounds the Government presented.

Defendant Siegelman is the former Governor of the State of Alabama. As such, his stature has resulted in heightened media coverage of not only the case but also the judges assigned to preside. Unsurprisingly given the identities of the Defendants, three judges in the Northern District of Alabama have already recused in an effort to preserve public confidence in the judicial system, and to ensure that the impartiality of the Court cannot reasonably be questioned in such an important case. In this context, the factual bases for recusal gain strength.

In sharp contrast to the other three judges previously assigned to this case, the record reveals that Chief Judge Clemon has made *extraordinary* efforts to remain the presiding Judge. His "Judicial Notice," issued *sua sponte,* attempted to put to rest any assertion that his daughter's financial connection to Defendant Siegelman should lead to his recusal. Also telling was the Memorandum Opinion disqualifying Douglas Jones, which contained a wholly unrelated footnote that again attempted to construe the record to eliminate any claim that Chief Judge Clemon's impartiality should be questioned. The Chief Judge's efforts to defeat recusal intensified once the Government filed its Motion to Recuse. The Court scheduled a hearing on the motion for the very next morning, and prearranged to have a witness available by phone in an effort to prove that Defendant Siegelman had no role in the hiring of his daughter's law firm. That witness' testimony was later

revealed to be incomplete, at a minimum, regarding the events surrounding his hiring.

The Court's Memorandum Opinion only underscores the Court's determination to avoid recusal. The Court had no answer for his documented complaints against an agent who has gathered evidence in this case and may be called as a witness. The Judge offered no explanation for the JCCC Report, which (a) was prepared with his input, (b) complained about the subpoena at the church and the treatment of church members, and (c) recounted how Chief Judge Clemon and his lawyers lodged complaints about the subpoena and the seizure of documents.

Instead, the Court's opinion misconstrued the record and arguments presented to the Court, attacked the media, and even challenged the U.S. Attorney's decision-making. By way of example, the Judge's recrimination of "AUSA Hart's allegation" that the Judge was a member of the JCCC is squarely refuted by the Judge's own FBI interview at the time of his appointment to the bench in which he stated he was a "Member of the Citizens Coalition headed by Dr. Richard Arrington." R. Ex. 218 at exh. 1. His attempt to cabin his complaints to "Los Angeles FBI agents" is refuted by the JCCC Report and his statements in interviews. In addition to these critical misstatements, the Court contorted statements by Government counsel at the August 17 hearing, *see, e.g.,* R. Ex. 170 at 30:7-17, *cited in* R. Ex. 179 at 3, ¶10, misconstrued the facts underlying Judge Coogler's recusal, *see supra* at 3-4, 20, and misapprehended the law governing case reassignment outside the district, *see supra* at 20-21.

Indeed, throughout the proceedings thus far, Chief Judge Clemon seems to have "shed the robe of the judge

and to have assumed the mantle of the advocate. The court thus [has] become[] lawyer, witness and judge in the same proceeding, and abandon[ed] the greatest virtue of a fair and conscientious judge – impartiality." *Reserve Mining Co. v. Lord*, 529 F.2d 181, 185-86 (8th Cir. 1976). To be sure, the Supreme Court has held that "judicial remarks . . . that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge," but the Court has also emphasized that "[t]hey *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994) (emphasis original). The record of this case clearly demonstrates that an average layperson would reasonably question Chief Judge Clemon's impartiality to adjudicate this case for all the reasons set forth above.

CONCLUSION

The Government respectfully requests that this Court issue a writ of mandamus to the district court, directing that court to enter an order recusing itself from presiding over *United States v. Phillip Kelley Bobo, et al.*, CR-04-C-200-W. Respectfully submitted, this 17th day of September, 2004,

ALICE H. MARTIN
United States Attorney for the
Northern District of Alabama
Counsel for the United States of America

/s/ Miles M. Hart
MILES M. HART
Assistant U.S. Attorney

/s/ Tamarra D. Matthews
TAMARRA D. MATTHEWS
Assistant U.S. Attorney

/s/ John Gibbs
JOHN GIBBS
Special Assistant
U.S. Attorney

/s/ Melissa K. Atwood
MELISSA K. ATWOOD
Special Assistant
U.S. Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

04-14765-H

IN RE: UNITED STATES OF AMERICA,

Petitioner.

On Petition for Writ of Mandamus to
the United States District Court for the
Northern District of Alabama

(Filed Sep. 29, 2004)

BEFORE: HULL, MARCUS, and WILSON, Circuit Judges.

BY THE COURT:

The government's motion to expedite consideration of the petition for writ of mandamus is GRANTED.

The government's motion to stay the district court proceedings is DENIED.

The government's motion to supplement the record is GRANTED.

The government's petition for writ of mandamus is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff.	)	
vs.	)	Case Number
PHILLIP KELLEY BOBO, DON EUGENE SIEGELMAN, and PAUL MICHAEL HAMRICK, Defendants.	)	**CR 04-C-0200-UWC**

SEVERANCE ORDER

(Filed Sep. 21, 2004)

The Court finds that:

1) Defendants Don Eugene Siegelman and Paul Michael Hamrick are not alleged to have participated in the act or transactions set forth in Counts Three through Seven of the Indictment;[1]

2) the trial of the charges alleged in Counts Three through Seven of the Indictment against Defendant Dr. Phillip Bobo will substantially prejudice the ability of the remaining Defendants to receive a fair trial on Counts One and Two of the Indictment;

3) the inflammatory, unfairly prejudicial and high publicized "other crimes" materials contumaciously filed

[1] *See* Fed. R. Crim. P. 8(b).

by the United States Attorney against Defendants Siegelman and Hamrick will have a substantial adverse affect on the ability of Dr. Bobo to receive a fair trial on Counts One and Two of the Indictment; and

4) under all circumstances, it is most unlikely that a jury can follow the Court's limiting instructions and appraise the independent evidence against each defendant based solely on that defendant's own statements, actions and conduct.

Accordingly, the Defendants' Motions to Sever (Docs. 71, 87, 102) are hereby GRANTED, in part.

The trial of Dr. Bobo is hereby SEVERED from the trial of Mr. Siegelman and Mr. Hamrick. Mr. Siegelman and Mr. Hamrick shall be jointly tried.

The trial of Defendants Siegelman and Hamrick shall commence on Monday, October 4, 2004. The trial of Defendant Bobo shall commence sometime after the rendition of a verdict in the Siegelman-Hamrick trial.

For purposes of future pleadings and orders, Counts One and Two of the Indictment, insofar as they relate to Defendants Siegelman and Hamrick, shall be treated as a separate case and designated as CR 04-C-200A-W by counsel for the parties and the Clerk of the Court.

Done this 21st day of September, 2004.

/s/ U.W. Clemon
Chief United States District Judge
U.W. Clemon

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff.	)	
vs.	)	Criminal Case Number **04-C-0200A-W**
PHILLIP KELLEY BOBO, DON EUGENE SIEGELMAN, and PAUL MICHAEL HAMRICK, Defendants.	)	

DISMISSAL WITH PREJUDICE OF INDICTMENT AGAINST DEFENDANTS SIEGELMAN AND HAMRICK

(Filed Oct. 15, 2004)

The United States' oral motion to dismiss this case (Tr. of Trial Proceedings, Vol. II of 10/05/04 at p. 34), pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure, is hereby GRANTED, with the consent of the Defendants Siegelman and Hamrick.

The Indictment of Defendants DON EUGENE SIEGELMAN and PAUL MICHAEL HAMRICK (Doc. 1) is hereby DISMISSED, with prejudice.

Done this 15th day of October, 2004.

/s/ U.W. Clemon
Chief United States District Judge
U.W. Clemon

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff.	)	
	)	Criminal Case Number
vs.	)	**CR 04-cr-~~400~~ 200-UWC**
PHILLIP KELLEY BOBO,	)	
	)	
Defendant.	)	

OPINION AND ORDER ON DEFENDANT'S FIRST MOTION IN LIMINE

(Filed Nov. 10, 2005)

Prior to his unsuccessful interlocutory appeal of this Court's failure to dismiss the indictment on double jeopardy grounds, Dr. Bobo filed his First Motion In Limine (Doc. 190.[2] The motion seeks to preclude the United States from offering any argument or evidence that competitive bidding was required for the Maternity Care Program. The Court deferred ruling on the motion; electing to carry the motion with the case. (Doc. 256). The United States has now responded to the motion, and it requests that the motion be denied. (Doc. 314). For the reasons which follow, Dr. Bobo's motion is due to be granted.

The Alabama Competitive Bid Law specifically provides that "the competitive bidding requirements of this article shall not apply to . . . contracts for securing the

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[2] *See, United States v. Bobo*, 419 F.3d 1264 (11th Cir. 2005) ("*Bobo II*").

services of . . . physicians. . . . " Ala. Code, § 41-16-51(a)(3). In *Alabama Attorney General's Opinion*, 2001-089 (February 1, 2001), former Alabama Attorney General (and now Eleventh Circuit Judge) William Pryor unremarkably, in light of the clear and unambiguous statutory language, opined that the Competitive Bid Law does not apply to contracts for medical services. Moreover, in the earlier iteration of this case, the Eleventh Circuit noted that "Alabama has no requirement that professional service contracts be competitively bid." *United States v. Bobo*, 344 F.3d 1076, 1085 (11th Cir.2003) ("*Bobo I*").

The indictment in this case, unlike the one involved in *Bobo I*, specifically alleges that "Alabama state law authorized the Alabama Medicaid agency to award contracts using a competitive-bid process, which the agency chose to do." (Doc. 1, p. 2). However, in the very next sentence, the Indictment alleges: "Alabama law prohibited bidders from making agreements that undermine competition in the bid process." *Ala. Code* § 41-16-55." But the statutory provision cited in the Indictment is a part of the Alabama Competitive Bid Law.

The United States has cited no authority for the proposition that the Competitive Bid Law is applicable to the conduct charged in the Indictment.

Consequently, Dr. Bobo's First Motion in Limine is hereby GRANTED. At the trial of this case, the United States shall not offer evidence or argue to the jury that the Alabama Medicaid's Maternity Care Program ("MCP")

contracts referenced in the Indictment are covered by the Alabama Competitive Bid Law.[3]

Dated this 9th day of November, 2005.

/s/ U.W. Clemon

[3] The granting of this motion does not preclude the United States from arguing and providing that the MCP did, in fact, utilize a bid process for its contracts. It does preclude argument and evidence that the MCP's bid process was required by the Alabama Competitive Bid Law.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CASE NO.:**
	)	**CR-04-C-200-W**
PHILLIP KELLEY BOBO,	)	
	)	
Defendant	)	

NOTICE OF APPEAL

(Filed Nov. 14, 2006)

COMES NOW the United States of America, by and through its United States Attorney, and hereby appeals pursuant to 18 U.S.C. § 3731 this Court's "Opinion and Order on Defendant's First Motion in Limine" excluding evidence (Doc. 319 dated Nov. 9, 2005, entered Nov. 10, 2005). *See United States v. Tovar-Rico*, 61 F.3d 1529, 1532 (11th Cir. 1995). The United States Attorney certifies that this appeal is not taken for purpose of delay and that the evidence at issue is a substantial proof of a fact material in the proceeding.

Dated this 14th day of November, 2005.

ALICE H. MARTIN
United States Attorney

/s/
MILES M. HART
Assistant United States
Attorney

/s/
TAMARRA MATTHEWS JOHNSON
Assistant United States Attorney

/s/
MELISSA K. ATWOOD
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that, on November 14, 2005, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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/s/
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-16392-GG

PHILLIP KELLEY BOBO,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Alabama

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(Filed Jan. 27, 2006)

BEFORE: ANDERSON, DUBINA and HULL, Circuit Judges.

BY THE COURT:

Appellee's motion to dismiss this appeal as frivolous is DENIED.

Appellee's motion to strike Appellant's Transcript Order Form is DENIED AS MOOT, as the district court clerk has issued a Certificate of Readiness. However, Appellant is ORDERED TO SHOW CAUSE within twenty-one (21) days of the date of the entry of this order (i.e., simultaneously with its brief) why the Certificate of Readiness should not be amended to eliminate from the

record on appeal the transcripts from Appellee's first trial and the post-severance records pertaining to Defendants Siegelman and Hamrick.

Appellant's Motion for Continuance is DENIED. Appellant's brief and record excerpts shall be due within twenty-one (21) days of the date of entry of this order and are to be physically received in the Clerk's Office on the date due.

On its own motion, the Court EXPEDITES this appeal. Appellee's brief shall be due within twenty-one (21) days of service of Appellant's brief. Appellant's reply brief, if any, shall be due within seven (7) calendar days of service of Appellee's brief. All briefs are to be physically received in the Clerk's Office on the date due.

Appellee is directed to notify the district court when his brief is filed, and the district court clerk is directed to transmit the record immediately upon receipt of such notice. Upon the completion of briefing, the Clerk is directed to expedite submission of this appeal for merits consideration.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

05-16392-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

PHILLIP KELLEY BOBO,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

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(Filed Mar. 7, 2006)

BEFORE: ANDERSON, DUBINA and HULL, Circuit Judges.

BY THE COURT:

On January 27, 2006, we ordered Appellant to show cause why the Certificate of Readiness should not be amended to eliminate from the record on appeal the transcripts from Appellee's first trial and the post-severance records pertaining to Defendants Siegelman and Hamrick. Appellant timely responded to our order.

The question of whether the designated records should be eliminated from the record on appeal is CARRIED WITH THE CASE.

Appellant's request to reassign this case to a different district judge is outside the scope of this interlocutory appeal and is therefore DENIED.

No. 05-16392-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellant,

vs.

PHILLIP KELLEY BOBO

Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA WESTERN DIVISION
No. 04-00200 CR-UC-RRA

BRIEF OF APPELLANT

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* * *

STATEMENT OF THE ISSUES

1. Were the Maternity Care Program contracts "covered" by Alabama's Competitive Bid Law when the Alabama Medicaid Agency decided to select providers for the program in accordance with the Competitive Bid Law and the and the procedures and regulations of the Competitive Bid Law were utilized throughout the bidding process?

2. Should this case be reassigned to a different district judge on remand due to the current district court's conduct in the proceedings to this point?

* * *

II. THIS CASE SHOULD BE REASSIGNED UPON REMAND DUE TO THE DISTRICT COURT'S DEMONSTRATED BIAS AGAINST THE GOVERNMENT AND THE GOVERNMENT'S CASE.

Bobo was indicted in May of 2004 along with former Alabama Governor Don Siegelman and Paul Hamrick, Siegelman's chief-of-staff at the time of the conduct charged in the indictment. *R1-1-1.* On September 21, 2004, the district court entered an order severing the trial of Siegelman and Hamrick from the trial of Bobo. *R7-243.* Siegelman and Hamrick proceeded to trial first. *R20-282.* During the proceedings leading up to that trial, many of which occurred before the severance, the district court demonstrated bias against – if not outright hostility to – the government and its case. Before upon that conduct, and because of the related nature of the two matters, the government respectfully requests that this case be reassigned to a different district judge on remand.

This court's ability to order reassignment, "is well established." *Chudasama v. Mazda Motor Corporation*, 123 F.3d 1353, 1373 (11th Cir. 1997), *citing* 28 U.S.C. § 2106; *see also, e.g., United States v. Remillong*, 55 F.3d 572, 578 n.12 (11th Cir. 1995) ("'We have the authority to order reassignment of a criminal case to another district judge as part of our supervisory authority over the district courts in this Circuit.'"), *quoting United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989). In considering whether to exercise this authority, three factors inform the Court's decision: (1) whether the original judge would have difficulty putting his previous views and findings aside; (2) whether reassignment is appropriate to preserve the appearance of justice; [and] (3) whether reassignment would entail waste and duplication out of proportion to the gains realized from reassignment." *Torkington*, 874 F.2d at 1446. Consideration of the district court's conduct in the light of these factors demonstrates the need for reassignment to ensure a fair process.

A. The Conduct of the District Judge In the Proceedings To This Point Demonstrates That He Would Have Difficulty Putting Aside His Previous Views And That Reassignment Is Appropriate to Preserve The Appearance of Justice.

1. Evidence of hostility and bias towards the government.

To understand the district court's bias, one need only look to the transcripts of the proceedings that occurred before a jury was selected to hear the charges against Siegelman and Hamrick. Almost immediately, the unwarranted hostility of the district court toward the government

was evident. For example, during a hearing on a motion to disqualify counsel for Siegelman, the district court threatened the intervention of the Marshal's Office when counsel for the government simply attempted to make an objection and preserve the record:

> [DOJ Attorney][12]: And what – you said that Mr. Henry stepped out of the meeting, what did Mr. Henry do?
>
> A. Mr. Henry stepped out and called Mr. Jones –
>
> [Defense Counsel]: Objection.
>
> THE COURT: The objection is sustained, the testimony is stricken.
>
> [DOJ Attorney]: Your Honor, if I may, he wasn't –
>
> THE COURT: No, you may not. You may ask another question, not along these lines.
>
> [DOJ Attorney]: Your Honor, if I may, just for the record, I think that –
>
> THE COURT: No, ma'am. Did you understand what I just directed you to do?
>
> [DOJ Attorney]: Yes, Your Honor.
>
> THE COURT: All right. And at the end of all this, you can make whatever proffer you wish to make for the record.

[12] The attorney involved in this exchange was sent by the Department of Justice's Professional Responsibility Advisory Office to handle the motion to disqualify as it related to Doug Jones, counsel for Siegelman and former United States Attorney for the Northern District of Alabama.

Now ask your next question, not related to what someone did when they left the room or what they said when they came back in the room.

[DOJ Attorney]: Your Honor, I'll just note for the record –

THE COURT: – don't –

[DOJ Attorney]: – that I –

THE COURT: – just – one moment.

[DOJ Attorney]: – that what someone did –

THE COURT: – let's – let's get one thing straight. Unless you want to spend the noon hour in the Marshal's Office, when I'm talking, you don't try to talk over me. Do you understand that? Do you understand that?

[DOJ Attorney]: Yes, Your Honor.

THE COURT: All right. And with that understanding, we'll now proceed. And you will either ask a question – another question along a different line, or you'll sit down.

[DOJ Attorney]: I understand, Your Honor. There is no intent on my part to talk over Your Honor. I just fell that at some point –

THE COURT: – just a moment.

[DOJ Attorney]: – I need to preserve the record –

THE COURT: One more time.

Let's get the marshal, some representative of the Marshal's Office up here.

(Marshal stepping up to the bench)

Do you have another question of this witness?

[DOJ Attorney]: I do have another question for this witness.

THE COURT: All right.

R14-152-112, 113, 114. Subsequently, during the same hearing, the court actually instructed the Marshal to take the DOJ attorney into custody. As the record demonstrates, counsel was merely attempting to make an objection.

THE WITNESS: Thank you, Your Honor. I would just say that there were other things like – we did not discuss, for example, the weaknesses in our case at trial.

THE COURT: What did you say in the meeting with Mr. Jones about the strengths and weaknesses of your case?

THE WITNESS: My recollection –

[DOJ Attorney]: Your Honor, if I may to testify now about what the strengths and weaknesses are –

THE COURT: The objection is overruled.

[DOJ Attorney]: – of the former – of the former case, that is –

THE COURT: – now, the Marshal will take Ms. Ludwig [DOJ Attorney] into custody at the next recess, since she insists that she's going to control this proceeding, I'm going to insist that she's wrong. Sit down, Ms. Ludwig.

> [DOJ Attorney]: Your Honor, I just wanted to make an objection.
>
> THE COURT: Now, what were the legal theories or –no, what were the strengths and weaknesses of the case that were presented in Mr. Jones' presences and not reflected at the trial?

R14-152-173, 174.[13]

The district court's conduct in threatening to have an attorney placed in the custody of the Marshal, when that attorney is simply trying to preserve the record, supports a determination that reassignment is warranted. Indeed, this Court has previously condemned similar conduct in an opinion directing reassignment of a case involving the same district judge. *See Hardin v. Dolgencorp, Inc.*, No. 03-15697, slip op. at 4 (11th Cir. April 5, 2005) ("When defense counsel tried to speak, the district court told counsel to sit down and threatened to incarcerate defense counsel for attempting to object. The district court later placed defense counsel in the Marshal's custody during a lunch break merely for objecting to the district court's characterization of the scope of a particular discovery request.") (unpublished opinion).[14]

Another example of hostility towards the government occurred on the day jury selection was scheduled to take

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[13] At the conclusion of the witnesses's testimony, the DOJ attorney apologized for "talking over" the court and explained that she was only trying to prevent the disclosure of "confidential government information." *R14-152-180, 181.* The court accepted the apology. *R14-152-181.*

[14] Because it is unpublished, this opinion is attached to this brief in accordance with 11th Cir. R. 36-2.

place for the Siegelman and Hamrick trial. *R20-282*. The district court had made a decision, *sua sponte*, to sequester the jury. In response, the government requested that the court instruct the jurors that the decision to keep them sequestered was made by the court and not one of the parties. The district court's response to this request was as follows:

> [Prosecutor]: . . . We would ask the Court to simply inform the jury of the fact that neither the defense nor the government requested the sequestration; that the Judge did that in the good judgment of the Court sua sponte.
>
> THE COURT: Well, Mr. Hart, how long have you been employed by the government of the United States of America?
>
> [Prosecutor]: Judge, I think I'm on record as saying I've been employed by the government of the United States for about two years.
>
> THE COURT: And on your two year experience, you tell me about how infrequent it is to have sequestered juries in high profile cases such as this?
>
> [Prosecutor]: Your Honor, I polled every senior member in my office and I can say going back at least 36 years, the longest-serving individual there, they are unaware of any jury in this district ever being sequestered. And I'm not saying it's inappropriate –
>
> THE COURT: Well, maybe that speaks to the fact – to the longevity of the Assistant United States attorneys in this district.

> What you're telling me is that for all those years since I've been a member of this bar, there's never been a sequestered jury in the Northern District of Alabama.
>
> [Prosecutor]: That may be so, Judge. And I'm not saying – I don't mean to even imply that it's inappropriate or unnecessary or anything like that. That's not my point.

R20-282-14, 15. Although the court then stated it would give the instruction, the reaction to the request set the tone for the remainder of the pre-trial proceedings and the court's evidentiary rulings that ultimately required dismissal of the charges.

2. Conduct at the pre-trial *James* hearing.[15]

a. Biased evidentiary rulings

Of the issues that the district court considered pre-trial, the most significant was whether the government could establish by a preponderance of the evidence that Siegelman and Hamrick were members of Bobo's conspiracy, thereby permitting the jury to consider out-of-court statements made by the co-conspirators. *See* Fed. R. Evid. 801(d)(2)(E). Neither party requested that the court conduct a hearing on this issue pre-trial; the court did so *sua sponte*.[16] Throughout the hearing on the matter, the

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[15] *See United States v. James*, 590 F.2d 575 (5th Cir.1979) (en banc).

[16] The Government does not challenge the court's authority to consider this issue pre-trial. In the context of the other proceedings, however, the court's *sua sponte* decision to take up this issue pre-trial

(Continued on following page)

district court displayed a predisposition against the evidence offered by the government and essentially took on the role of an advocate for the defense.

First, as the following record excerpts show, the court repeatedly sustained "objections" to government questions when the record demonstrates that no objection was made by the defense:

> [Prosecutor]: Okay. Did you have any discussion with defendant Siegelman about this cover story for the money?
>
> THE COURT: The objection is sustained.
>
> [Prosecutor]: Now, you testified that you informed the governor of the plan. Did you ask the defendant Siegelman to make the phone call to Dr. Sorenson?
>
> A: On behalf of Dr. Bobo, I said that Dr. Bobo thought that a phone call to Dr. Sorenson would expedite the whole situation in District 4.
>
> [Prosecutor]: Okay. Did he make the phone call?
>
> A: I was not there when the phone call was made, but yes, the phone call was made.
>
> THE COURT: Did you hear –
>
> [Prosecutor]: How do you know?
>
> THE COURT: Did you hear the conversation?
>
> THE WITNESS: No, sir, I did not.

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coupled with its refusal to resolve the issue before empaneling the jury further demonstrates the court's bias.

THE COURT: So how do you know if was made?

THE WITNESS: Dr. Bobo told me the phone call was made, and –

THE COURT: *The objection is sustained.*

[Prosecutor]: Judge, I think she didn't finish her answer, Your Honor.

THE WITNESS: – and the governor also acknowledged the phone call was made.

THE COURT: All right.

[Prosecutor]: That's the answer I was trying to get to, Judge.

THE COURT: All right.

[Prosecutor]: Let me – let me say it again.

THE COURT: I heard it the first time.

R20-282-46,47 (emphasis added).

[Prosecutor]: Now, you say that he acknowledged that the money had been moved. Did he indicate that the had done anything?

THE COURT: The objection is sustained.

R20-282-76.

[Prosecutor]: To your knowledge, can a governor, whether or not he has constitutional responsibility for the budget, can he use his position to move money?

THE COURT: Objection sustained. It's not helpful to me in any event.

R20-282-97.

Additionally, more than once, the court refused to provide an explanation for its rulings, even when one was specifically requested by the government.

> [Prosecutor]: Okay. Now, to your knowledge, was Senator Poole ever told that this money that ended up, that he ended up spending as you went into with the defense, was not intended to be – was he ever told this was not intended to be his pork money? Even though he ended up spending it that way, did he ever have any idea that it was actually intended for –
>
> THE COURT: The objection is sustained.
>
> [Prosecutor]: Can I know what the objection is, Your, Honor?
>
> THE COURT: If you can't figure it out –
>
> [Prosecutor]: I can't figure it out. So I would like it for the record.
>
> THE COURT: Next question.

R20-282-73. On one occasion, the court not only declined to provide an explanation, it mocked the government's request.

> [Prosecutor]: Did Paul tell you that he had talked to Senator Poole about the money?
>
> [Defense attorney]: Object to leading.
>
> THE COURT: It's sustained.
>
> [Prosecutor]: Your Honor, the defendant is a co-conspirator. That's what we're alleging, and that is what this hearing is about.
>
> THE COURT: I sustained the objection, Mr. Hart. Go to your next question.

> [Prosecutor]: Your Honor, I would like to ask questions about statements made by the Defendant Hamrick.
>
> THE COURT: I have sustained the objection to your question, Mr. Hart. Go to your next question if you have one. Otherwise, this witness –
>
> [Prosecutor]: Your Honor, I honestly did not understand what the grounds were to the objection. Is it hearsay?[17]
>
> THE COURT: *Mr. Hart, I'm not here teaching a class in evidence.*

R20-282-73,74 (emphasis added). In the absence of an understanding regarding the basis for the court's ruling, the government was hampered in any attempt to elicit the evidence it felt important in a manner acceptable to the court.

b. Continually interrupting the government's examination of its witnesses

During the *James* hearing, the court repeatedly interrupted the questioning of witnesses by the government, injecting its own inquiries. Although, under Federal Rule of Evidence 614(b), "[t]he court may interrogate witnesses, whether called by itself or by a party," such authority is "abused when the judge abandons his proper role and assumes that of advocate." Fed. R. Evid. 614, advisory committee's note. Here, a review of the proceedings demonstrates the court essentially assuming the role

[17] The record shows that the objection was to a "leading" question, but obviously the prosecutor did not hear the objection. And, the court's refusal to explain the basis for its ruling was unreasonable.

of an advocate, attempting to elicit evidence favorable to the defense while repeatedly rebuffing the government's attempts to present its case.

> Q. Okay. To your knowledge, did Dr. Bobo raise a lot of money for defendant Siegelman's gubernatorial campaign?
>
> A. Yes, sir.
>
> Q. How much?
>
> THE COURT: Do you personally know?
>
> THE WITNESS: No, sir. I –
>
> THE COURT: Next question.

R20-282-24. The prosecutor then asked if the witness knew whether Bobo had raised any money for the former Governor Siegelman's effort to legalize a lottery in Alabama. *R20-282-24.*

Apparently not deeming Bobo's fund raising efforts for Siegelman to be relevant – despite the fact that such conduct would shed light on whether Siegelman had a motive to assist Bobo in his bid rigging scheme – the court grew impatient, and took over the questioning of the witness:

> THE COURT: What do you know about any knowledge on the part of either then Governor Siegelman or Mr. Hamrick that Dr. Bobo was trying to rig a bid for the Medicaid contract?
>
> THE WITNESS: Judge, I know that Dr. Bobo developed a plan –
>
> THE COURT: Yeah.

THE WITNESS: – in order to receive those bids, or some of those bid in certain districts.

THE COURT: All right.

THE WITNESS: He asked the governor to help him implement that plan.

THE COURT: All right. And what plan was that?

THE WITNESS: The plan was two-fold, the first of which was to move some additional money –

THE COURT: And as you answer, Ms. Herring, if you would point out any conversation Dr. Bobo had with you in the presence of either Mr. Siegelman or Mr. Hamrick, I would appreciate it.

R20-282-25. This pattern continued throughout Ms. Herring's testimony, with the court repeatedly interrupting the government's examination of the witness. *R20-282-25 to 51.*

The same conduct also occurred during the testimony of the other government witnesses. During the testimony of Nick Bailey, an aide to Siegleman at the time of the charged conduct, the court apparently grew impatient with the manner in which the government chose to conduct the examination:

THE COURT: I don't really need to know all of this for purposes of this hearing.

[Prosecutor]: Your Honor, I think it goes to what I'm trying to get to, if I could offer that –

THE COURT: Well, I'll get right to it.

> [Prosecutor]: – is the relationship of this witness to the defendants, and it goes to credibility.
>
> THE COURT: All right. Mr. Bailey, do you have any knowledge that either the Defendant Siegelman or Defendant Hamrick *knowingly became members of a conspiracy, an unlawful conspiracy of any kind.*
>
> [Prosecutor]: I would object to the Court's question, Your Honor.
>
> THE COURT: It's overruled.
>
> THE WITNESS: No, sir.

R20-282-85 (emphasis added) The court's inquiry was improper and erroneously required the witness to draw a legal conclusion. Most significantly, it exemplifies the fact that the court was seeking evidence favorable to the defense. The court asked a similarly slanted question of Ms. Herring: "Is it fair to say that you were never aware of and never participated in any plan or scheme of Dr. Bobo which you felt to be unlawful?" *R20-282-55.*

The court's conduct in questioning the witnesses demonstrates bias and supports a finding of reassignment. Indeed, this Court previously cited similar conduct by this same judge as a basis for ordering reassignment on remand. *See Hardin v. Dolgencorp, Inc.*, No. 03-15697, slip op. at 4 (11th Cir. April 5, 2005) ("Although a district court is permitted to ask questions during a trial, the district court erred by straying from neutrality in its questions and by assuming the role of an advocate in the court's extensive cross-examination of Dollar General's key witness and its rehabilitation of one of the plaintiff's witnesses.") (unpublished opinion) (footnoted omitted). Similarly, reassignment is appropriate here.

c. The court's refusal to rule on the *James* motion until after the jury was sworn.

Another example of the court's bias, came at the end of the hearing when the government requested, but was denied, a pre-trial ruling on the *James* motion, *i.e.*, whether there was sufficient evidence that Siegelman and Hamrick were members of the conspiracy to allow for the admission of out-of-court statements of co-conspirators. Not only did the court refuse to rule, but when the prosecutor sought permission to ask a question about that refusal, the court threatened him with the Marshal. This conduct is reflected in the record as follows:

> THE COURT: We are going to start selecting the jury, and we're going to have to clear this first row here.
>
> [Prosecutor]: Your Honor, if we could, we are prepared to argue on the motion if we can.
>
> THE COURT: Not at this time. We're going to bring in the jury, and we're going to select a jury.
>
> [Prosecutor]: Your Honor, we would like a ruling on the motion before the jury is seated.
>
> THE COURT: I'm sure there are a lot of things you would like, Mr. Hart.
>
> [Prosecutor]: Under Rule 12(d), Your Honor, I think we are entitled to a ruling on this motion [under] the Federal Rules of Criminal Procedure.
>
> THE COURT: We will bring the jury in. Sit down, Mr. Hart; and if you have some problem with it, I think a marshal can assist you.
>
> [Prosecutor]: *May I ask a question, Your Honor*?

> THE COURT: *Marshals, would you see to it that Mr. Hart takes a seat.*
>
> [Prosecutor]: That won't be necessary, Judge, I can sit down.
>
> THE COURT: Let's bring in the jury.

R20-282-135, 36 (emphasis added).

The court's refusal to rule cannot be attributed to a need for additional time or a desire to hear additional evidence or argument.[18] The record manifests the court's conclusion – reached well-before the jury was sworn – that the government had failed to present *any* evidence in support of the existence of a conspiracy.

The *James* hearing was held on October 4, 2004. *R20-282.* That afternoon, following testimony, the government offered transcripts of phone conversations, including one between Bobo and the President of AHN wherein Bobo made his offer seeking to obtain AHN agreement to drop out of the bid process in district 4 and to give up the contact it had been awarded in district 7. *R20-282-124.* The court questioned the government about the transcript and, in doing so, clearly conveyed its opinion regarding the government's failure to present evidence of a conspiracy involving Siegelman and Hamrick. On this point, the record reveals the following:

> THE COURT: All right. Well, is it a fair statement that nowhere in this transcript does Dr. Bobo say that Governor Siegelman had the money transferred to the Fire College?

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[18] The court never allowed the government to formally argue the motion before ruling.

[Prosecutor]: Your Honor, those exact words are not –

THE COURT: Well, what's the nearest to those words would you point me to?

[Prosecutor]: Your Honor, I think you have to look at the entry on Page 4 that I called the Court's attention to. I believe that supports the inference that the governor who Dr. Bobo is – moved the money or assisted him in moving the money.

THE COURT: Well, then what's the questions on this?

"Maxwell: Well, I mean, did he put that money in there for you? I mean, how does that get there?

Bobo: We just got it there."

[Prosecutor]: Yes, sir. And it goes on to say, "You don't want to know how we got it there."

THE COURT: It says, "You don't want to know about that, but it's there, and it will be an annual thing."

[Prosecutor]: I think when he says "You don't want to know how it got there," I think certainly at least suggests it was not an open and aboveboard transaction, Your Honor.

THE COURT: Yes, sir. But that's not the issue. It's whether this Defendant Siegleman knowingly became a member of the conspiracy.

[Prosecutor]: I understand that, Your Honor; and this is one piece of evidence we presented to the Court for the Court's consideration in light of

everything else to be presented here today, Your Honor.

THE COURT: *Everything else, it's not very much.*

[Prosecutor]: Well, that's Your Honor's decision to make.

THE COURT: *In fact, everything else isn't anything else.*

R20-282-129, 130 (emphasis added).[19] Again, this exchange occurred before the jury was sworn and before the government's request for a formal ruling under Rule 12(d) of Federal Rules of Criminal Procedure.

Later that evening, after 7:00 p.m., a jury was seated and sworn. *R21-301-15,16.* Immediately thereafter, the

[19] The court's view of the evidence in this regard itself reflects bias. Regardless of whether the government met its burden under the preponderance-of-the-evidence standard, to say there was no evidence that Siegelman and Hamrick were involved in a conspiracy does not reflect an unbiased view of the evidence. For example, Amy Herring, a former aide to Siegelman and an employee of Bobo at the time of the events charged in the indictment, testified that she relayed to Siegelman Bobo's plan to use money from the Fire College to convince a competitor for the MCP contracts to drop its attempt to become a provider. *R20-282-33.* According to Herring, Siegelman stated he wanted to do everything he could to help Bobo and later acknowledged that the money had been moved to the Fire College as requested. *R20-282-34, 36, 36.* Nick Bailey, a former aide to Siegelman, testified that "[i]t was common knowledge in our office that we were attempting to assist Bobo with his request to – with funding for the Fire College" and that he knew Bobo had "made a request of the governor for assistance in funding the Fire College." *R20-282-85.*

court discussed its decision to delay ruling on the conspiracy issue as follows:[20]

> The Court has received the government's motion styled, The Government's Motion for Pretrial Ruling Pursuant to Rule 12(d).
>
> Rule 12(d) provides that "the Court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The Court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. Where factual issues are involved in deciding a motion, the Court must state its essential findings on the record."
>
> The relevant statutory provision is Section 3731 of Title 18 which provides, in relevant part, that "an appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding."
>
> The pretrial matter that I have heard today outside the presence of the jury is not necessarily pretrial. In point of fact, most courts make the determination – the preliminary determination

[20] By this time, the government had filed a written motion seeking a pretrial ruling under Rule 12(d).

> of membership in a conspiracy – during the trial itself. And I am certain that there is ample precedent for holding this kind of hearing during the trial.
>
> In any event, when I rule on the motion that's pending before me, that decision will not be ipso facto a decision suppressing or excluding evidence. In point of fact, I think that I have received in evidence most of what has been offered by the government.
>
> And so the government's motion for a pretrial ruling is obviously moot at this time, since the jury has been sworn. But even if it weren't moot, it would be denied for the reason that the order is not one suppressing or excluding evidence. That is the order to be entered.

R21-301-19.

As the district court recognized, Rule 12(d) of the Federal Rules of Criminal Procedure provides that (i) "[t]he court must decide every pretrial motion before trial unless it finds good cause to defer a ruling" and (ii) the court "must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal." Here, both quoted aspects of the rule were violated. First, the deferral of a ruling denied the government an opportunity to appeal. Second, the district court failed to set forth any "cause" for a deferral, much less "good cause." Indeed, the only rationale provided by the court was that it delayed ruling on that matter because, in its view, it could. This rationale, in and of itself, demonstrates a lack of good cause. *See Barletta v. United States*, 644 F.2d 50, 59 (1st Cir. 1981) (granting government's request to compel a district court to rule on a motion pre-trial and

stating that "the district court's failure to articulate specific reasons for a deferral [is] dispositive of the question whether 'good cause' for a deferral might exist").

Moreover, the court's interpretation of the relevant rule itself suggests bias. A conclusion that this was not a pre-trial matter and that it did not involve the exclusion of evidence does not comport with the facts. Although the court was correct that a determination regarding whether a conspiracy existed need not be made prior to trial,[21] the fact is that, here, the court *sua sponte* took up the matter prior to trial. It held a pre-trial hearing, heard all of the evidence the government intended to present on the matter, and then, on the record, expressed an opinion that the government's evidence was no evidence at all. There was then, nothing left to be done. Thus, for purposes of Rule 12(d), the matter was pre-trial. *See Barletta*, 644 F.2d at 59 ("[O]nce a district court has decided that a motion may be raised prior to trial . . . it may then find no 'good cause' for deferring a ruling . . . since to do so would adversely affect the government's right to appeal.")

The court's conclusion that the matter did not involve the exclusion of evidence was similarly unsupported. A finding that there was no conspiracy precluded the government from presenting to the jury and out-of-court

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[21] *See, e.g., United States v. Hemelryck*, 945 F.2d 1493, 1498 (11th Cir. 1991) (stating that the determination as to whether a conspiracy exists for the purpose of admitting hearsay statements under the coconspirator exception to the hearsay rule "need not be made prior to trial"). A "district court has discretion to admit the statements subject to proof [of the required elements] during the court of the trial." *Id.* (citations omitted).

statements of the co-conspirators.[22] Indeed, the only reason for conducting a *James* hearing was to determine whether statements of certain alleged co-conspirators would be admissible at trial. Thus, in the absence of a sufficient and articulated basis to warrant a deferral of the ruling, the only conceivable reason for the delay was to deny the government an opportunity to appeal, an action prohibited by Rule 12(d).

This Court has recognized that "[r]eassignment is appropriate where the trial judge has engaged in conduct that gives rise to the appearance of impropriety or a lack of impartiality in the mind of a reasonable member of the public." *Torkington*, 874 F.2d at 1446, *citing United States v. White*, 846 F.2d 678 (11th Cir. 1988). Based upon the conduct set forth and discussed above, such is the case here. The district court's actions throughout the pre-trial proceedings create, at a bare minimum, an appearance of bias against the government and its case. *See Torkington*, 874 F.2d 1446 (recognizing that "[r]eassignment may be appropriate . . . if a judge conducts a trial in a manner that creates the appearance that he is or may be unable to perform his role in an unbiased manner").

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[22] The court's rationale that its ruling did not result in the exclusion of evidence because "[i]n point of fact, [the court] received in evidence most of what has been offered by the government," makes no sense. *R21-301-19.* It simply further exemplifies the lack of a reasonable explanation for the court's decision to delay its ruling until after the jury was sworn.

B. Reassignment Will Not Result In Waste and Duplication Out of Proportion to the Gains Realized From Reassignment.

Finally, the requested relief will not entail waste and duplication out of proportion to the gains realized from reassignment. *Torkington*, 874 F.2d at 1446. Although Bobo was tried previously based upon his conduct in relation to the MCP contract bidding process, the district judge currently assigned to this matter did not preside over those proceedings. Thus, he was not privy to the evidence and testimony presented at the previous trial. And, because of its ruling regarding the lack of a conspiracy involving Siegelman and Hamrick, there was no trial of Dr. Bobo's co-defendants. This is, moreover, not a complicated case. A new judge should have little trouble "getting up to speed" regarding the facts and issues necessary to preside over a trial of the case. *See Chudasama*, 123 F.3d 1374. Thus, the "gains to be realized from reassignment will far outweigh the costs." *Id.* Accordingly, the government respectfully requests that this matter be reassigned.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

UNITED STATES OF AMERICA,	CR-04-C-200-W
Plaintiff,	Tuscaloosa, Alabama
VS.	
DON EUGENE SIEGELMAN and PAUL MICHAEL HAMRICK,	October 4, 2004 9:08 A.M.
Defendants.	

TRANSCRIPT OF PRE-TRIAL PROCEEDINGS
BEFORE CHIEF JUDGE U. W. CLEMON

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[3] INDEX

WITNESSES:	Direct	Cross	Redir.	Recrs.
AMY HERRING	19	51-Segall	71	
NICK BAILEY	80	93-J.Espy	97	
ANDREW AARON SORENSEN	98	106-J.Espy		
JOHN BEATTY MAXWELL, JR.	114	119-Threatt		
		123-Wise		

[4] October 4, 2004 9:08 A.M.

PROCEEDINGS

THE COURT: This is the time set for trial in United States of America versus Don E. Siegelman and Paul Michael Hamrick.

Is the government ready?

MR. HART: The government is ready, Your Honor.

THE COURT: Is the defendant Siegelman ready?

MR. J. ESPY: Ready, Your Honor.

THE COURT: Is the defendant Hamrick ready?

MR. WISE: Ready, Your Honor.

THE COURT: There are some preliminary matters which we will take up. The government has filed a motion to preclude for the defendants from making reference to the Court's assessment of the credibility of Special Agent Gerald Shockley at the time when he testified before the Court and the Court was the fact finder. Obviously, the Court's assessment of his credibility is not relevant; and so while I think the government's motion is unnecessary, it is granted.

Mr. Siegelman has filed a motion to preclude the use of information obtained by the government as a result of the subpoena served on January 24th on the Alabama Fire College.

Mr. Espy?

MR. J. ESPY: Your Honor, Mr. Threatt is going to address that.

[5] THE COURT: Mr. Threatt?

MR. THREATT: May it please the Court, Glennon F. Threatt on behalf of the defendant Don E. Siegelman.

Your Honor, there is – in the caption of the motion, the date is incorrect. The motion was actually served on the 10th of September, and in the body of the motion I corrected that.

THE COURT: All right.

MR. THREATT: Your Honor, it's really a Rule 16 motion. If there was information developed there that is relevant, there is an ongoing discovery requirement by the government. We've not received any information that was the result of or that was derivative of any materials that have been –

THE REPORTER: I'm sorry?

MR. THREATT: We have not received any information that would be discoverable because of the ongoing discovery requirement of the government that was either obtained or that's derived from information that was obtained as a result of that subpoena.

THE COURT: Is a representative of the Fire College present?

(No response.)

THE COURT: I reviewed the subpoena and it just appears to me that the Fire College was being asked

to turn [6] over all of its records. And while I guess technically it's none of my business, I just wonder the extent to which the Fire College could have complied with the subpoena and continue to do its business. But that issue is not before me.

The government will respond to Mr. Siegelman's motion.

MR. HART: Your Honor, we've been speaking about a subpoena. I think there's also a search warrant at issue in that motion, was there not, that was served at the Fire College? That – that's correct.

So the government's response is this: We are required under Rule 16 to produce things that are discoverable as soon as we have them. Now, at the time as we speak, that search warrant and the various subpoenas that were swerved at the Fire College – in the search, about 55 boxes of documents were seized – 55 banker's boxes of documents over a period of half a day.

THE COURT: Well, you asked for all records, documents, magnetic tapes, computers, hard drives, files, other storage devices containing memos, letters, lists, outlines, e-mails, notes, printouts, contracts, letters of appointment, invoices, requisitions, purchase orders, budget reports, employee records, payee records, leave and attendance records, evaluations, resumes, checks, deposits, bank statements, financial statements, tax returns, receipts, [7] and delivery tickets.

MR. HART: That's correct, Your Honor. And their response to that on a good bit of that subpoena is, well, that's stuff you seized in the search. So what we're

doing right now is, these agents are looking through the 50 to 55 boxes of material, thereabouts.

THE COURT: All right. Someone had to swear before a Magistrate-Judge concerning the items which you expected to find in these documents. Do you have a copy of the affidavit?

MR. HART: I don't have it with me, judge.

THE COURT: All right. I'll get it.

MR. HART: Okay. Very well.

THE COURT: What did you expect to find in these records?

MR. HART: Well, amongst other things – and I think what's pertinent to the motion – some 1999 budget documents. For instance, we heard some information that documents were being shredded – evidence that may be pertinent to this trial was being shredded or about to be shredded – 1999 budget documents, to be specific. So, that was one of the things in there.

And then there are a number of items that pertain to potential crimes at the Fire College that really are unrelated to this case.

[8] So, there are budget documents there, and the agents are going through them now. I have instructed them to try to find, as fast as they can, the 1999 budget documents. If they were to find them and if they were relevant, we are entitled to use them in this trial.

THE COURT: Was this subpoena issued right after you had represented to the Court that there were two

separate and distinct $550,000 appropriations to the State Fire College for that year?

MR. HART: I don't know if we would – I can't answer the question, Judge, I don't recall when I asserted that to you and when the subpoena was issued.

THE COURT: Well, maybe somebody can help you, because I believe that we should have a transcript which will reflect the date on which you made that representation.

MR. J. ESPY: Your Honor, I believe it was August 27th.

MR. SEGALL: Mr. Hart's concession, Your Honor, was August 17, 2004, I believe this – grand jury subpoena, now, Judge – continuing to investigate this case after the indictment was, I believe, September 10.

MR. HART: Judge, that's not what we're doing.

THE COURT: Well –

MR. HART: If I could –

THE COURT: No, sir.

[9] MR. HART: – address the point.

THE COURT: The question I put to you was, what was the date. You didn't remember it.

MR. HART: I don't remember it, Your Honor.

THE COURT: We now know it was August – what?

MR. J. ESPY: 17th, Your Honor.

THE COURT: August 17th.

MR. HART: I would say this, Your Honor. If there is shredding of evidence being done, that is a crime as we speak.

THE COURT: Of course it is.

MR. HART: Right.

THE COURT: Of course it is. And if someone has shredded relevant information with the intention of destroying information or evidence in the case, I'm sure that that's a matter that will duly be presented to the grand jury.

But I would – and I suppose I can simply call the Clerk's Office in Birmingham and get a copy of the affidavit that was used to get this search warrant.

MR. HART: Very well, Your Honor.

And the government's position is simply this: If we come upon in a search evidence that is relevant to us, to the government's case in this trial, even if the search was pertaining to another crime – if we get evidence, as long as [10] we turn it over to the defense as soon as we have it, we're entitled to use that at trial if it's pertinent, relevant evidence.

MR. J. ESPY: We, of course, do not agree, Your Honor. I guess we can address it at that time. But I don't want it to be said that we agree with that instruction.

THE COURT: All right. Well, I'm going to grant the motion in limine. And, Mr. Hart, if you uncover any evidence from this fishing expedition that's relevant in

this case, you will then provide it to the defendants and we'll revisit this issue at that time.

MR. HART: Very well, Your Honor.

And I would dispute the characterization of a "fishing expedition", Judge. That's not fair to the government. If you look – you have not seen the affidavit, and I would urge the Court to do what the Court said you might, and look at that affidavit. It's a substantial question, and that's why there's a search warrant. That's our job, Judge.

THE COURT: Yes, sir. I simply base my characterization on the matters that I have just read into the record.

There is a motion in limine relating to Dr. Marc Armstrong. Yes, sir. Mr. Espy?

MR. J. ESPY: Yes, sir. I think you said you were going to carry that with the case, Your Honor.

[11] THE COURT: Yes, sir. It has been carried with the case. The fact of the matter is that the jurors are now completing the questionnaires. And as many things as we can dispose of while the jury is otherwise occupied, we ought to do it.

But let's proceed to the hearing on a preliminary determination of the –

MR. HART: Judge, if I may –

THE COURT: Yes, sir.

MR. HART: – raise one other issue before we get cranked up on that.

THE COURT: Yes, sir.

MR. HART: I want to inform the Court and the defense that as of Friday, I think we provided some statements of Mr. Boolus Boohaker and some of those to the Court. He has recanted a portion of his statement. And that was the portion where he said he met with –

THE COURT: Hold on just a moment.

MR. HART: Yes, Your Honor.

(Short pause.)

THE COURT: You may continue, Mr. Hart.

MR. HART: Mr. Boohaker has changed or recanted his testimony or his statement – his previous statements – in part. And I think it impeaches, potentially impeaches, the testimony of some others. And I think, therefore, I'm [12] informing the Court and defense of it.

He has changed his testimony to the extent that he said he was involved in a meeting with Ms. Herring – between himself and Amy Herring and Mr. Segall, whereupon they made an offer – "they" being Ms. Herring and Mr. Boohaker – made an offer to Mr. Segall who was affiliated with the competitor in the Medicaid Maternity Care Program bid process – made an offer to him to territorially allocate in that bid process. Mr. Boohaker has now said that didn't happen, that meeting didn't occur – or that that wasn't the subject of the meeting.

THE COURT: Well, I'm struggling with a government issued pen that won't write.

MR. HART: Now, Judge, you just can't blame us for pens.

THE COURT: Well, this is a government issued pen in the judicial arena.

MR. HART: We'll accept the notice of fact, Judge.

THE COURT: Mr. Boohaker will be called, of course?

MR. HART: That's our plan, Your Honor.

THE COURT: All right. Well, let's – Mr. Espy?

MR. J. ESPY: Yes, sir. Your Honor, they have a statement of him, or a recorded statement, or either a matter that was reduced to writing after they got this. We submit we're entitled to that under *Brady* or *Giglio*, if they've got [13] – they met with him on Friday and they taped it, or –

MR. GIBBS: No. No.

MR. HART: No, we didn't.

MR. GIBBS: There is no statement.

MR. J. ESPY: Okay.

THE COURT: All right.

MR. HART: There is no statement, and we're providing the substance of the change –

THE COURT: All right.

MR. HART: – orally, which is what we have from the witness.

Other issues, Your Honor, is Jencks material, which we're going to provide this morning to the defense, make

copies for each party. I would point out previous testimony of witnesses in what we've been referring to as *Bobo I*, the first Bobo trial, is Jencks. I haven't produced that. I know the defense has the copies of the previous trial transcript, and I'm assuming I don't have to produce that.

MR. J. ESPY: We agree, Your Honor.

THE COURT: That's correct.

MR. HART: Your Honor, one other issue we wanted to – wanted to ask the Court, request the Court, make a motion, effectively, that the Court inform the jury – the Court has ordered that the jury be sequestered, which is an unusual procedure here and it's a burdensome procedure, as I'm sure [14] everyone is aware. And typically, the government requests these things, if you look across the country – typically, the government might – I think the government would request it more.

We would ask the Court to simply inform the jury of the fact that neither the defense nor the government requested the sequestration; that the Judge did that in the good judgment of the Court sua sponte.

THE COURT: Well, Mr. Hart, how long have you been employed by the government of the United States of America?

MR. HART: Judge, I think I'm on record as saying I've been employed by the government of the United States for about two years.

THE COURT: And on your two years experience, you tell me about how infrequent it is to have sequestered juries in high profile cases such as this?

MR. HART: Your Honor, I polled every senior member in my office and I can say going back at least 36 years, the longest-serving individual there, they are unaware of any jury in this district ever being sequestered. And I'm not saying it's inappropriate –

THE COURT: Well, maybe that speaks to the fact – to the longevity of the assistant United States attorneys in this district.

What you're telling me is that for all those years since [15] I've been a member of this bar, there's never been a sequestered jury in the Northern District of Alabama.

MR. HART: That may be so, Judge. And I'm not saying – I don't mean to even imply that it's inappropriate or unnecessary or anything like that. That's not my point.

My only point is, I think a juror might believe that we asked for that. It's burdensome, they might resent it. And I simply ask the Court to inform them of the fact, which it's not prejudicial to the Court, that the Court did this in its own good judgment sua sponte. That's my only request.

And I think that applies equally to the defendant. They could infer certain things there. So that's my motion. I think that's what we ask, Your Honor.

THE COURT: What's the position of the defendant?

MR. J. ESPY: However the Court desires to handle it and feels is the best judicial way is satisfactory to the defense, Your Honor.

THE COURT: All right.

MR. WISE: Your Honor, I'm not going to stand up and repeat everything that Mr. Siegelman's lawyers say in this trial. If I don't stand up, that means I agree with them.

THE COURT: All right. Thank you.

MR. WISE: I'm on the tail end of the whole thing, Your Honor.

THE COURT: All right. The jury will be told that [16] the Court ordered the sequesterion.

Any other preliminary matters before we take upon the hearing on the question of whether these defendants knowingly became members, or a member of a conspiracy?

MR. HART: One other short issue, Judge. We've got transcripts, both enhanced or unenhanced. We're going to provide those to the defense today and see if we can get a stipulated transcript this evening, before tomorrow. If in fact – of course, it will be unnecessary, depending on the outcome of the conspiracy – we're talking about transcripts of these tapes we've been discussing. I'm going to provide those to the defense this morning sometime.

THE COURT: All right. All of the parties should be on notice that the direct examination of a witness will consume not more than one hour; the cross-examination will be similarly limited in time; the redirect examination –

MR. HART: Judge, I beg your pardon, Your Honor.

THE COURT: Yes, sir.

MR. HART: Does "similarly limited in time" mean there's an hour to cross-examine and an hour for direct, is that what that means?

THE COURT: Yes, sir. Precisely what I said.

MR. HART: Okay. So it's a – very well, Your Honor.

THE COURT: Fifteen minutes on redirect, and 15 [17] minutes on recross; and then five minutes for the further examination of the witness by the party who puts on that witness.

MR. HART: For the what, Your Honor? I couldn't quite make – I'm sorry, Judge –

MR. GIBBS: Five minutes for redirect.

MR. HART: – we can't hear that well in here, Your Honor.

THE COURT: All right.

MR. HART: Okay.

MR. WISE: Your Honor?

THE COURT: Yes, sir.

MR. WISE: One matter that I would like to go ahead and raise now.

THE COURT: Yes, sir.

MR. WISE: I was going to wait until we got the jury, but it seems like it's fitting now.

As the Court knows, Mr. Hamrick is named second in this indictment. Therefore, my cross-examination of the

government's witnesses will follow Governor Siegelman's lawyer. I know the Court is not going to allow me to re-ask questions that have already been asked.

THE COURT: Yes, sir.

MR. WISE: However, if there is – if you could inform the jury of the procedure that we will follow, I would [18] like for the jury to know that just because I'm not asking questions as extensive as maybe Governor Siegelman's lawyer because they'd be repetitious, does not mean that I do not find that testimony to be applicable to Mr. Hamrick.

THE COURT: All right. You have to remind me of that, Mr. Wise, when the time comes.

MR. WISE: Yes, sir, I'll do that.

THE COURT: All right. I'm also going to caution the lawyers for all parties that to the extent that I can do so, I intend to hold your feet to the fire of the Federal Rules of Evidence. That means that ordinarily a lawyer putting on a witness may not lead the witness. You will not put answers into the mouths of the witnesses you call. That's the principal thing to remember. There will be other things as well, but that's the most important thing to remember.

I try to move along swiftly, so repetitive questions will not be allowed. You may ask them, but they won't be answered.

All right. Now let's get down to the evidence of the conspiracy. The government will call its first witness.

MR. HART: The government calls Amy Herring.

MR. J. ESPY: Your Honor, the defendant Siegelman would invoke the rule.

THE COURT: All right. The rule having been [19] invoked, the Court will expect counsel for the respective parties to enforce the rule.

MR. HART: Your Honor, we'd point out to the Court we have our agent, case agent, Special Agent Samaniego present before the bar.

THE COURT: All right. She'll be excused from the rule.

AMY HERRING, GOVERNMENT'S WITNESS, SWORN,

THE CLERK: State your name for the record, please.

THE WITNESS: Amy Herring.

THE CLERK: Could you spell your last name, please?

THE WITNESS: H-e-r-r-i-n-g.

THE CLERK: The city and the state where you live.

THE WITNESS: Montgomery, Alabama.

MR. J. ESPY: Your Honor, is there any possibility we could move the podium just a little bit? I'm blocked from the witness.

THE COURT: Sure. Move it over.

MR. HART: May it please the Court, may I proceed?

THE COURT: Yes, sir.

DIRECT EXAMINATION

BY MR. HART:

Q. Good morning, Ms. Herring.

A. Good morning.

Q. Ms. Herring, what do you do?

[20] A. I have a public relations and lobbying firm in Montgomery, Alabama.

Q. Okay. Do you know defendant Siegelman, Don Siegelman?

A. Yes, sir.

Q. Where is he today?

A. He's sitting at the counsel table.

Q. What color is his tie?

THE COURT: I – I – she knows Mr. Siegelman.

MR. HART: Okay. Good enough.

Q. How long have you known defendant Siegelman?

A. About 20 years.

Q. How did you first meet him?

A. I was a reporter at *The Dothan Eagle*, and he was just elected secretary of state.

Q. Okay. Have you ever worked for defendant Siegelman?

A. Yes, sir.

Q. In what capacity did you work for him?

A. I worked in his campaign in '94 and also worked in his lieutenant governor's office.

Q. Okay. And when you were in the lieutenant governor's office, was that a full-time position?

A. Yes, sir.

Q. And what did you do for the lieutenant governor, for the defendant Siegelman, during that period of time?

A. I did legislative and policy work and some print [21] communications work.

Q. Do you know defendant Hamrick?

A. Yes, Sir.

Q. How long have you known him?

A. Probably about 15 years.

Q. And how did you first meet him?

A. I think I met Paul in the Baxley campaign in '86.

Q. Okay.

A. Maybe before.

Q. Have you ever worked with defendant Hamrick?

A. Yes, sir.

Q. When?

A. On numerous campaigns, and also in the lieutenant governor's office.

Q. He worked in the lieutenant governor's office when?

A. When Governor Siegelman was a lieutenant governor.

Q. And what was – what was his position during that period of time in the lieutenant governor's office?

A. He was – if we had a chief of staff, he was the chief of staff.

Q. Okay. Do you know a man named Nick Bailey?

A. Yes, sir, I do.

Q. Who is Nick Bailey?

A. A personal friend of mine.

Q. Okay. Did you ever – how did you get to know Nick [22] Bailey?

A. In the '94 lieutenant governor's race.

Q. And in what capacity did you get to know him during the lieutenant governor's race in 1994?

A. I worked in the campaign primarily in the run-off and in the general election, and Nick was working in the campaign as well.

Q. Okay. Now, you've said "I worked in the campaign" several times, and I hate to keep repeating myself – you're speaking of in the Siegelman campaign –

A. Yes, sir.

Q. – or the candidates –

A. – yes, sir. Yes, sir, I'm sorry.

Q. What campaign did Nick Bailey work in?

A. In Governor Siegelman's lieutenant governor's campaign.

Q. Okay. And you said he later worked for lieutenant – in the lieutenant governor's office. What was his position in the lieutenant governor's office?

A. Nick's title, I think, was executive assistant.

Q. Okay. Do you recall when defendant Siegelman was elected governor?

A. Yes, sir.

Q. Did you work for defendant Siegelman on his staff after he became the governor?

A. No, sir.

[23] Q. What were you doing – what was your line of work while the defendant was the governor of the state of Alabama?

A. I was a lobbyist and did public relations work.

Q. Okay. As a lobbyist, did you have good access to defendant Siegelman?

A. Yes, sir.

Q. Okay. And what does that mean, to say you had "good access" as a lobbyist?

THE COURT: I know what it means.

MR. HART: Okay, Judge. I – I'm – I don't want to lead, Your Honor, and I will speed up.

Q. Do you know Dr. Phillip Bobo?

A. Yes, sir.

Q. How do you know him?

A. Dr. Bobo had been involved in the legislative process several years and in and out of Montgomery during legislative sessions. I went to work with him in February of '99.

Q. Okay. And at the time he hired you, what did Dr. Bobo hire you to do?

A. He, at that time, was competing for a Medicaid contract for Maternity Waiver Program; and he had hired me to do public relations and education and an educational layout program when he received any bids; prior to the bid process going through, he hired me to do lobbying work.

Q. Okay. To be clear, that was – I think I understood your [24] answer – but he hired you to work on a program he was interested in bidding on?

A. Yes, sir. Maternity Waiver Program.

Q. When you went to work for him in February of '99 was the bid process in place?

A. Yes, sir.

Q. Okay. To your knowledge, did Dr. Bobo raise a lot of money for defendant Siegelman's gubernatorial campaign?

A. Yes, sir.

Q. How much?

THE COURT: Do you personally know?

THE WITNESS: No, sir. I –

THE COURT: Next question.

THE WITNESS: Okay.

THE COURT: And we're not going to get bogged down in this.

MR. HART: I'm not asking for –

THE COURT: At this point, for purposes of this hearing, it's not relevant.

MR. HART: I'm with you, Your Honor. Yes, sir. Very well, Your Honor.

Q. Did defendant Bobo raise money for the lottery?

A. Yes, sir.

THE COURT: And I don't want to hear about the lottery at this point.

[25] Let me ask you this, Ms. Herring.

THE WITNESS: Yes, sir.

THE COURT: What do you know about any knowledge on the part of either then Governor Siegelman or Mr. Hamrick that Dr. Bobo was trying to rig a bid for the Medicaid contract?

THE WITNESS: Judge, I know that Dr. Bobo developed a plan –

THE COURT: Yeah.

THE WITNESS: – in order to receive those bids, or some of those bids in certain districts.

THE COURT: All right.

THE WITNESS: He asked the governor to help him implement that plan.

THE COURT: All right. And what plan was that?

THE WITNESS: The plan was two-fold, the first of which was to move some additional money –

THE COURT: And as you answer, Ms. Herring, if you would point out any conversation Dr. Bobo had with you in the presence of either Mr. Siegelman or Mr. Hamrick, I would appreciate it.

MR. HART: Judge, could I ask you to just speak up just a hair?

THE COURT: All right.

MR. HART: I apologize, Your Honor. I can't quite [26] hear you.

THE COURT: All right.

THE WITNESS: Okay. First of all, may I answer your last question first?

THE COURT: Yes, ma'am.

THE WITNESS: In relation to the plan to implement the bidding process, to my knowledge, Dr. Bobo did not have a conversation in my presence with either Governor Siegelman or Paul –

THE COURT: All right.

THE WITNESS: – dealing with that directly.

THE COURT: All right. Continue your testimony.

THE WITNESS: Dr. Bobo had devised a plan that entailed moving some money within the educational budget to the Fire College, and also making a phone call to Dr. Andrew Sorensen, who was then the President of the University.

Dr. Bobo solicited the governor's help and Mr. Hamrick's help in those endeavors.

THE COURT: Tell me exactly the details of the plan as you know them.

THE WITNESS: Okay. First of all, let me say that I know – I know the details of the plan in general details, Judge.

THE COURT: All right. All right.

THE WITNESS: And also let me say that I was not [27] involved any way directly with any phone calls that were made to Dr. Sorensen. So, my knowledge is going to be limited to the Fire College.

THE COURT: All right.

THE WITNESS: Except for what I was told either by Phillip or in very general terms by the governor.

THE COURT: All right. Now, was it your understanding that what Dr. Bobo was doing was illegal?

THE WITNESS: No, sir.

THE COURT: And did he ever say to you that he wanted to use Governor Siegelman or Mr. Hamrick for some illegal purpose?

THE WITNESS: No, sir.

THE COURT: I take it what he said to you was that he wanted to move some money from the Special Education Fund into the budget of the Fire College; and once it was moved into the Fire College's budget, he would then have some say on how the money was used?

THE WITNESS: Yes, sir. That's correct.

THE COURT: And it was his intention to use that money to, in effect, buy off his competition, was that what he told you, or words to that effect?

THE WITNESS: No, sir. He never used the words "buy off". He said that he thought that we could fix the situation by moving some money around differently.

[28] THE COURT: Did he give you any specific details?

THE WITNESS: Yes, sir. The money was to have gone to the Fire College –

THE COURT: Yes, ma'am.

THE WITNESS: – and then was to have been diverted to another entity. And then at that juncture, the hope was – or Phillip's plan – was then Dr. Sorensen, through Capstone, would exert enough energy to get the competing bidder in that district to either drop their bid or no longer compete or not pursue what was going to be a very lengthy court process to object to the bidding process.

THE COURT: All right. Mr. Hart?

MR. HART: Thank you, Your Honor.

THE COURT: Well, before –

THE WITNESS: Yes, sir.

THE COURT: – did Dr. Bobo ever say to you that he had told either Mr. Siegelman or Mr. Hamrick the details of this plan of his?

THE WITNESS: He told me the details of the plan.

THE COURT: Yes, ma'am.

THE WITNESS: He indicated to me that he had general conversations with the governor about the plan, but he never told me specifically what he had said to the governor.

He asked me, however, to go and relay that information back to the governor.

[29] THE COURT: All right. And did you?

THE WITNESS: Yes, sir.

THE COURT: All right. What specifically did you tell the governor?

THE WITNESS: I just relayed that Phillip had a plan that he would like to ask the governor to help him implement; and that was movement of the money to the Fire College, and in addition, to making a phone call to Dr. Sorensen.

THE COURT: And what did you tell Governor Siegelman that Dr. Bobo wanted him to say to Dr. Sorensen?

THE WITNESS: You know, Your Honor, I didn't. I didn't tell him anything in any details about the conversation with Dr. Sorensen, just simply because if

there was not an effort made that was successful to move the money, then there was no reason to have a phone call with Dr. Sorensen.

THE COURT: I see. And how would the money be moved, as you put it?

THE WITNESS: Well, back in those days, there was money in the education budget.

THE COURT: Yes.

THE WITNESS: So basically, it wouldn't have to be taken away from another entity, it could just be added to the bottom line. And in the committee process, that appropriation would be increased.

[30] THE COURT: Well, this would be in the legislative process?

THE WITNESS: Oh, yes, sir. Yes, sir.

THE COURT: All right. So what we're talking about is a situation in which members of the House of Representatives, the – what's the committee that handles the Special Education Trust Fund in the House –

THE WITNESS: In the – it's different –

THE COURT: – Ways and Means.

THE WITNESS: – it's different than when you were down there.

THE COURT: All right. Well, some things do change in 24 years.

THE WITNESS: Yes, sir. One committee handles the education budget now; one committee handles the general fund budget –

THE COURT: All right.

THE WITNESS: –in both the House and the Senate now.

THE COURT: So that there would be a committee of State Representatives in the House –

THE WITNESS: Yes, sir.

THE COURT: – who would have to put the money in the Fire College's budget; or, senators on the committee that dealt with the subject in the Senate would have to line item [31] that amount of money for the Fire College in its budget?

THE WITNESS: Yes, sir. That's correct.

THE COURT: Or if neither of them did it in the House, I suppose it could always be done in a conference committee?

THE WITNESS: Yes, sir, if the budget went to conference committee.

THE COURT: So the plan depended on the utilization of specific representatives and/or senators?

THE WITNESS: Yes, sir. That's correct.

THE COURT: All right. Put another way, the governor couldn't do it by himself?

THE WITNESS: That's correct.

THE COURT: And the chief of staff couldn't do it by himself?

THE WITNESS: That's correct.

THE COURT: And Dr. Bobo couldn't do it?

THE WITNESS: No, sir.

THE COURT: The three of them together couldn't do it without some – well, they simply couldn't implement the plan without the involvement of members of the Legislature?

THE WITNESS: That's correct.

THE COURT: All right.

BY MR. HART:

Q. Ms. Herring, you said you told – you talked to the [32] governor at Dr. Bobo's request?

A. That's correct.

Q. And I believe the Court asked you, did you tell the governor the plan?

A. That's correct.

Q. Did you tell the governor that Dr. Bobo wanted the governor's help in getting $550,000 moved to the Fire College?

MR. SEGALL: Object to leading, Your Honor.

THE COURT: Sustained.

MR. HART: It doesn't suggest an answer, Your Honor. It could be yes or no. The answer may be no, could well be no.

MR. SEGALL: Object to leading.

THE COURT: Sustained.

Q. What, in the plan of this plan – I want to follow up on what the Court asked – did you – did you tell the governor the purpose of the money going to the Fire College?

A. In general terms.

Q. Did you speak of the Medicaid Maternity Care Program bid process?

MR. SEGALL: Your Honor, I object to leading.

THE COURT: It's sustained.

MR. HART: Judge, I don't understand how you can ask that question any less leading. The answer can be no –

[33] MR. SEGALL: "What did you say", that would not be leading.

THE COURT: Well –

MR. HART: Did you –

THE COURT: – we're not here –

MR. HART: I'll rephrase, Your Honor.

THE COURT: – we're not here as law professors. I'm not a law professor. I've made my ruling.

Q. What did you say to the governor about the purpose of the money, if anything?

A. I told the governor that Dr. Bobo had asked me to come and ask him to please help in getting some additional

money moved to the Fire College, because Dr. Bobo was of the opinion that if the money could get moved to the Fire College, that there was a possibility that something could be worked out in that district.

Q. Did you tell the governor – or what did you say to the governor as to the ultimate disposition of the money and where it would go, if anything?

A. That the money ultimately would go ultimately to Capstone. And at that juncture, hopefully Dr. Sorensen, who was then the President of the University, would be willing to get involved and ask the folks who were involved with Druid City and the other folks in that district to either not compete or back off or withdraw their bid; or at the very [34] least, not go forward with what was going to be a very lengthy and cumbersome process of trying to get the bids overruled or thrown out.

At this juncture – excuse me, go ahead.

Q. As to the – okay. So you made this request of the governor. What did he do? Did he – did he – what did the governor do?

A. He – he acknowledged the request and said – you know, we all want to do whatever we can do to help Phillip.

Q. Okay. Do you know whether or not the governor attempted to get the money moved?

A. I know that the governor – and at this juncture, you've got to understand that the governor is at the state house everyday.

Q. I understand. Just –

MR. SEGALL: Please don't interrupt. We object to interrupting the witness.

THE WITNESS: I was just going to say that I know that once the money had been moved – once the budget went through the committee process and the money had been moved, the governor acknowledged to me that the money had been moved.

Q. Did he acknowledge to you that the money had been moved – let me ask you this. Were you –

THE COURT: When you say the governor acknowledged [35] to you that the money had been moved, can you tell me exactly what the governor said to you?

THE WITNESS: Well, Judge, by the time I had this conversation with the governor, the committee had met.

THE COURT: Yes.

THE WITNESS: So it was –

THE COURT: What committee?

THE WITNESS: The Senate Education, Finance and Taxation Committee.

THE COURT: All right. And who's the chairman of that?

THE WITNESS: Senator Hank Sanders.

THE COURT: All right. So the F & T, Education Committee met and it had added, I take it –

THE WITNESS: Yes, sir.

THE COURT: – a half a million dollars to the Fire College –

THE WITNESS: And that was shown in what is commonly referred to as a spreadsheet.

THE COURT: Right.

THE WITNESS: That is developed by the legislative fiscal office.

THE COURT: Right.

THE WITNESS: So by the time I had interaction with the governor, the committee had taken that action.

[36] THE COURT: All right. And what specifically did the governor say to you?

THE WITNESS: Judge, I can't specifically recall what the governor said to me.

THE COURT: Well, what was the substance of it?

THE WITNESS: It was just, in gist, I see the money has been moved; or, I see where the committee has approved the movement of the money, or just an acknowledgment of what had occurred.

THE COURT: "I see where the committee had moved the money".

THE WITNESS: Or, I see that the money has been moved; or – and at that juncture, I notified Dr. Bobo that the money had officially been moved.

THE COURT: Could you have obtained from other sources at that time on the day when the governor made this statement to you, could you have obtained from other sources knowledge that the money had been moved into the budget of the Fire College?

THE WITNESS: Yes, sir.

THE COURT: And I take it you could have obtained it from the legislative fiscal –

THE WITNESS: I could have obtained it from a document prepared by the legislative fiscal office in addition to any member of the legislative committee.

[37] THE COURT: I see. All right. And was this confidential information?

THE WITNESS: I'm sorry?

THE COURT: When the Senate F & T appropriated that half a million dollars to the Fire College, put it in the budget, was it then a matter of public record?

THE WITNESS: Yes, sir.

THE COURT: All right. so what the governor was telling you was a matter of public record?

THE WITNESS: My conversation with the governor followed the committee meeting.

THE COURT: All right.

BY MR. HART:

Q. Ms. Herring, do you remember talking to me this morning and testifying in the grand jury?

A. Yes, sir.

MR. SEGALL: Your Honor, I – I object to this. He's put on his own witness who he's been able to have access to for almost a year. We object to his attempt to impeach his own witness –

MR. HART: Judge –

MR. SEGALL: – a conversation he had with her.

THE COURT: I – I'm going to overrule the objection. A party, under the Rules of Evidence, is permitted to impeach his own witness.

[38] You may proceed, Mr. Hart.

BY MR. HART:

Q. Ms. Herring, did you tell me and other agents on more than one occasion that after you had that initial phone call with the governor where you informed him of the plan, that you talked to him again and he told you, "I moved the money"?

MR. SEGALL: Object to leading.

THE WITNESS: I –

THE COURT: Overruled.

THE WITNESS: Yes, sir. And I don't think that I just negated that. I just said that he acknowledged to me that the money had been moved.

Q. That's a different question. I'm going to ask it again so I can get an answer.

THE COURT: No, she's answered the question. Her answer is yes, she told you. She used the words

"acknowledged". But I take it that she told you that the – that he said, "I moved the money".

MR. SEGALL: "The money had been moved", I believe, Your Honor, is what she said.

THE COURT: All right. What did you say? What did you tell Mr. Hart and the other investigators?

THE WITNESS: I have told them since day one with my conversations with the governor that the governor had said that he would like to do whatever he could do to help [39] Phillip; and I had laid the plan out to him.

And that the governor, after the money had been moved, told – acknowledged that the money had been moved. And he – he could have very clearly said, "I got the money moved", but he did make me aware that the money had been moved.

THE COURT: I see.

Q. Okay.

THE COURT: As I indicated at an earlier hearing, in order to resolve this issue I need to hear from the persons with the power to move the money.

Is the – and this is not to you – is Senator Sanders or some other Senator going to be called?

MR. HART: Not by the government, Your Honor.

THE COURT: All right. Then I will infer from that failure of the government to call the senators – I take it you're also not going to call Senator Poole?

MR. HART: We have no intention of calling Senator Poole at this time, Your Honor.

THE COURT: All right. I infer from that that you will not call them because they will not say that either Governor Siegelman or Mr. Hamrick approached them or any other senators and asked them to move the money.

MR. HART: Could I have one moment, Judge?

THE COURT: Yes, sir.

(Short pause.)

[40] MR. HART: Judge, we would object – first of all, the government objects –

THE COURT: Well, finish the witness.

MR. HART: Yes, Your Honor.

Q. Ms. Herring, you said – I think the court asked you a question, and in response you said it was public record or it could be known from various sources that money had moved in the Fire College budget?

A. Yes, sir. That's correct.

Q. As a lobbyist, you closely follow things like that?

A. Yes, sir, I do.

Q. To your knowledge, do other lobbyists closely follow money in the budget?

A. Yes, sir.

Q. Did anyone ask you what the money in the Fire College budget was being moved for?

MR. SEGALL: Your Honor, I object to leading. This is leading.

MR. HART: Judge, it does not suggest an answer. It's a question.

THE COURT: The objection is overruled.

THE WITNESS: I'm sorry. Would you repeat –

BY MR. HART:

Q. Did anyone ask you what the money in the Fire College budget that was moved that you responded that you had seen [41] from various sources – did anyone ask you what that money was for, any other lobbyist?

THE COURT: Well, actually, you're eliciting –

MR. SEGALL: Hearsay.

THE COURT: – a hearsay response. The objection is sustained.

MR. HART: Okay, Your Honor. Very well.

Q. Did Dr. Bobo have a plan to explain the movement of the money to the Fire College budget?

A. Yes, sir, he did.

Q. What was the plan?

A. The plan was to move the money to the Fire College and then it would become what was perceived as discretionary funds, and senators oftentimes have discretionary funds allocated to their district. That would have been money that would have been allocated to the Fire College, which at that time was in Senator Phil Poole's district.

So, in common terms it would be considered his, quote, pork money, unquote.

Q. And Dr. Bobo, he – did he mention Senator Poole specifically when he talked about the plan to explain this money?

A. Yes, sir, he did –

MR. SEGALL: I object to the hearsay about Dr. Bobo.

MR. HART: He's a coconspirator, Judge. If he's [42] not, that's why we're here.

THE COURT: The very purpose of this hearing is to determine whether he's a coconspirator –

MR. SEGALL: We object.

THE COURT: The objection is sustained.

MR. SEGALL: – exactly.

MR. HART: Judge, I think in determining whether a person or a party is a conspirator under *Bourjaily* and under the Eleventh Circuit cases, the Court can consider and should consider the statement of the alleged coconspirator. We are alleging at this point that Dr. Bobo was a coconspirator. I think the Court should consider under those cases – and I've got another one somewhere – that statement.

And at the end of this proceeding you can use that, the Court should use that under that case to determine whether or not he was. And if he wasn't at that point – that's why we're here.

I think I'm entitled to ask Ms. Herring about her conversations with the alleged coconspirator at this point.

THE COURT: Well, certainly you're entitled at a preliminary hearing such as this to ask her about any statements that Dr. Bobo made to the defendants in this case.

But I'll indulge you, Mr. Hart.

MR. HART: Very well, Your Honor.

THE COURT: I'll overrule the objection, let her [43] answer the question.

BY MR. HART:

Q. Did Dr. Bobo mention Senator Poole specifically or not as part of this plan that you've testified was to be a cover story for the money?

A. Yes, sir.

Q. What did he say?

A. Well, as I explained earlier, oftentimes certain senators get discretionary money for projects in their districts. And at that juncture, Dr. Bobo's plan was that the money would be considered special project money for the Fire College. However, it was not Dr. Bobo's plan for the money to have been spent that way.

Q. Okay. Did – what did Dr. Bobo say, though, you've said – about Senator Poole? Did he mention Senator Poole's name as a part of this plan?

A. He mentioned Senator Poole's name as part of the plan. I do not know, though, whether he had a conversation with Senator Poole about the plan.

Q. That's not my question.

A. Okay.

Q. What did he say about Senator Poole? How did Dr. Bobo say Senator Poole was going to be used, whether he knew it or not, whether there was a conversation about this plan?

A. That the money at the Fire College would be considered [44] discretionary money that Senator Poole could allocate.

Q. Okay. Did you have any discussion with defendant Siegelman about this cover story for the money?

THE COURT: The objection is sustained.

MR. HART: I'm not sure I understand the objection, Judge. I didn't hear one.

THE COURT: Never mind. Ask your next question.

MR. HART: Your Honor, for the record, could I find out the basis of the objection? I just didn't hear it. I want to know, so I can ask my next question without drawing another objection.

THE COURT: Your use of the phrase "cover story".

MR. HART: Very well, Your Honor.

Q. Did you have a discussion with defendant Siegelman about this plan that you've testified to, Dr. Bobo's plan, for explaining the money moved into the Fire College budget?

A. No.

Q. Did you have a conversation with defendant Hamrick about this plan of Dr. Bobo's for explaining the money moved into the Fire College budget?

A. Yes.

Q. What did he say?

A. When Paul and I had a conversation about this, I explained to him that Dr. Bobo thought that once the money was moved that it would be considered discretionary money for [45] Senator Poole to use.

THE COURT: Now, Dr. Bobo was telling you, what, that this is what the law is, this is what he's already raised with Senator Poole, or what?

THE WITNESS: No, sir. I'm not aware, or was I privy to any direct conversations that Dr. Bobo had with Senator Poole.

THE COURT: And isn't there, Mr. Hart, a statement somewhere from Senator Poole that this money was his discretionary money and that he had specific plans for the use of that money; and that, in effect, those plans are completely inconsistent with the theory of the government in this case?

MR. HART: I think there is a statement from Senator Poole, Your Honor. I'd have to refresh myself on that statement to testify to the Court about it, but I'll respond to the question as best I can.

There is a statement from Senator Poole that says he had money going to the Fire College. And whether or not Senator Poole actually ended up with money that he spent

or whether or not Senator Poole was told by defendant Hamrick, this is going to be your money, when in fact it wasn't, when in fact it was going to be used for something different – because, you know, we can get that evidence before the Court, or the defense can.

[46] THE COURT: Yeah, you're going to have to get it before me if I'm going to find that Senator Poole did not intend to use the money as he stated –

MR. HART: That's not what we're asserting, Judge.

THE COURT: – but – what's your next question?

MR. HART: Very well, Your Honor.

Q. Now, you testified that you informed the governor of the plan. Did you ask the defendant Siegelman to make the phone call to Dr. Sorensen?

A. On behalf of Dr. Bobo, I said that Dr. Bobo thought that a phone call to Dr. Sorenson would expedite the whole situation in District 4.

Q. Okay. Did he make that phone call?

A. I was not there when the phone call was made, but yes, the phone call was made.

THE COURT: Did you hear –

Q. How do you know?

THE COURT: – did you hear the conversation?

THE WITNESS: No, sir, I did not.

THE COURT: So how do you know it was made?

THE WITNESS: Dr. Bobo told me the phone call was made, and –

THE COURT: The objection is sustained.

MR. HART: Judge, I think she didn't finish her answer, Your Honor.

[47] THE WITNESS: – and the governor also acknowledged the phone call had been made.

THE COURT: All right.

MR. HART: That's the answer I was trying to get to, Judge.

THE COURT: All right.

Q. Let me – let me say it again.

THE COURT: I heard it the first time.

MR. HART: Okay.

Q. Okay. Now, Ms. Herring, at a certain point in time, did you become aware that a criminal investigation into the Medicaid Maternity Care Program and Dr. Bobo's involvement had been instigated?

A. Yes, sir.

Q. How did you become aware of that?

A. I initially came – became aware of it from a phone call from Boolus Boohaker, and a subsequent phone call from Dr. Bobo himself.

Q. Okay. What did Dr. Bobo say to you?

A. Dr. Bobo said that the FBI had come to his home and had asked a whole lot of questions, had launched an investigation.

Subsequent to that, of course, it became, you know, newspapers – it was in the newspaper and those kinds of things.

[48] Boolus called me – Mr. Boohaker, excuse me – called me shortly before Dr. Bobo called me to make me aware of that; and my subsequent conversation was with Phillip.

Q. Okay. Did Dr. Bobo say anything else to you? He said, the FBI has been here, there's an investigation. Did he say anything else?

A. He said, you will probably get questioned about this case. Don't say anything about your conversations with the governor or with Nick Bailey.

MR. HART: Your Honor, I can't recall and co-counsel – I can't remember, I think the Court asked a question early on and I may have gotten a partial answer about the question – I wanted to reask the question, because I don't remember whether it was complete or not, about the conversation this witness had with defendant Hamrick pertaining to Senator Poole.

THE COURT: All right.

Q. Let me ask again, and you may have answered it, but I don't recall because we were a little disjointed there.

What conversation, if any, did you have with defendant Hamrick about Senator Poole and this – Phillip's

plan to explain this money as Senator Poole's discretionary money?

MR. WISE: Your Honor, I object. Asked and answered. He has gone over it.

MR. HART: Judge –

[49] THE COURT: It may not have been clear. I overrule.

THE WITNESS: Answer?

THE COURT: Yes, ma'am.

THE WITNESS: I told defendant Hamrick and outlined for defendant Hamrick what Dr. Bobo's plan was in regard to the money being moved to the Fire College and it being considered discretionary money for Senator Poole.

BY MR. HART:

Q. Did you tell defendant Hamrick the plan – did you tell defendant Hamrick Dr. Bobo's plan for the ultimate disposition of the money going to the Fire College?

A. I told Paul that Dr. Bobo felt strongly that if the money was able to be moved, that something could be resolved in District 4.

Q. Something in District 4, that being the Medicaid Maternity Care Program in District 4?

A. Yes, sir.

MR. HART: Okay. Judge, that's all the questions I've got for this witness.

THE COURT: All right. You say "something could be resolved in District 4" if the money were moved; right?

THE WITNESS: Yes, sir.

THE COURT: And that's what you told Mr. Hamrick?

THE WITNESS; Yes, sir.

THE COURT: Was there a dispute, a controversy at [50] that time about District 4?

THE WITNESS: Yes, sir.

THE COURT: And had a lawsuit been filed, or do you know?

THE WITNESS: Judge, I don't know.

THE COURT: All right. And what was the dispute about?

THE WITNESS: The dispute was over who was actually going to get the bid.

THE COURT: All right.

THE WITNESS: And whether if, in fact, the Tuscaloosa group – Phillip had been awarded the bid. There was a dispute over the bid; and the question was whether that dispute could be resolved –

THE COURT: All right.

THE WITNESS: – without the district having to either be re-bid or go into court.

THE COURT: All right. Was there ever any discussion in your presence over the question of whether these kinds of contracts for physician services were subject to the bid law at all?

THE WITNESS: Yes, sir. These services were put out on what's called an ITB. And it's different, as you well know, than buying pencils and computers.

THE COURT: Yes. All right. Cross-examination?

[51] CROSS-EXAMINATION

BY MR. SEGALL:

Q. Good morning, Ms. Herring.

A. Good morning, Mr. Segall.

Q. Ms. Herring, this conversation you just described with Dr. Bobo that Mr. Hart just asked you about, that occurred around June of 1999?

A. Yes, sir, that would be correct.

Q. All right. And after that time and before you met with the grand jury, you were represented by counsel; correct?

A. Yes, sir.

Q. And you understood from before you ever went to the grand jury you had to tell the truth and all of the truth in response to the questions you were asked; is that correct?

A. Yes, sir. That's correct.

Q. And you went into the grand jury fully intending, regardless of what Dr. Bobo may or may not have said, you went to the grand jury fully intending to tell the truth; is that correct?

A. Yes sir. That's correct.

Q. You agree that Dr. Bobo is a pretty big exaggerator?

A. Yes, sir, I do.

Q. In fact, he would say some things that just flat out weren't true sometimes, would he not?

A. Yes, sir.

[52] Q. And I take it from your grand jury testimony that you consider Hank Sanders to be an honest person; correct?

A. Yes, sir.

Q. He's a person you would believe if he testified under oath?

A. Yes, sir.

Q. Whatever you did in connection with representing Dr. Bobo and NHS – NHS was his company; correct?

A. Yes sir. That's correct.

Q. You didn't believe at the time that you did it that you were violating the criminal law at all, did you?

A. No, sir, I did not.

Q. All right. You didn't have any intent to violate the criminal law, did you?

A. No, sir.

Q. And, in fact, it was your understanding that Capstone, who you've mentioned in your testimony, was going to do honest and legitimate work for any money it received from the Fire College; correct?

A. I can't address that, Mr. Segall.

Q. Well, did you ever suggest to anybody that Capstone was going to do other than legitimate work for any money it received from the Fire College?

A. No, sir, I did not.

Q. You never suggested to Governor Siegelman that [53] Capstone – if money was moved to the Fire College, you never suggested to Governor Siegelman that Capstone would not be doing honest and legitimate work, did you?

A. No, sir, I did not.

Q. And you never indicated that to Mr. Hamrick either, did you?

A. No, sir, I did not.

Q. You didn't believe, did you, Ms. Herring, that anything you were asking Governor Siegelman to do was unlawful in any way, did you?

A. No, sir, I did not.

Q. And as I understand it, you're not suggesting today that there was any reason for the governor to know that there was anything fraudulent or unlawful about anything you were asking him to do; is that correct?

A. That's correct.

Q. The governor, insofar as anything you know, never agreed to do anything illegal; is that true?

A. That's correct.

Q. And to your knowledge, based on the conversation that you have described, as to your knowledge, he never knew that anybody else planned to do anything illegal –

MR. HART: Objection.

Q. – in connection with the Maternity Care Program –

MR. HART: Objection.

[54] Q. – if they –

MR. HART: Objection.

MR. SEGALL: I think the question –

THE COURT: – just a moment. Just a moment. Let him finish his question, Mr. Hart.

MR. HART: Okay. Very well, Your Honor.

THE COURT: Then I'll entertain the objection.

BY MR. SEGALL:

Q. My question is, to your knowledge – just talking about your knowledge, now.

A. Yes, sir.

Q. The governor never knew that anyone else planned to do anything illegal with respect to the Maternity Care Program, if indeed anyone did plan to do anything illegal; is that correct? You can answer.

THE COURT: You may answer.

THE WITNESS: To my knowledge, that's correct.

MR. HART: Objection, Your Honor.

Q. The Alabama Fire College –

MR. HART: Objection.

THE COURT: It's too late now.

Q. – the Alabama Fire College is an arm of the state of Alabama, is it not?

A. Yes, sir.

Q. And Capstone is an arm of the University of Alabama; [55] correct?

A. That's correct.

Q. And the University of Alabama is an arm of the state?

A. Yes, sir.

Q. So, it's your understanding that Capstone, likewise, is an arm of the state of Alabama; correct?

A. Yes sir. That's correct.

THE COURT: Is it fair to say that you were never aware of and never participated in any plan or scheme of Dr. Bobo which you felt to be unlawful?

THE WITNESS: Yes, sir.

Q. Do you agree with me that Capstone performs a great purpose for the state of Alabama – trains medical doctors?

A. Yes, sir.

Q. All right. You know, don't you, based on your experience as a lobbyist and working in the Legislature that it's common for one Alabama state agency to provide funds for another state agency?

A. Yes, sir.

Q. In fact, am I not correct that before the 1999 regular session, the Fire College received funding from the Department of Public Health, didn't it, in the preceding fiscal year?

A. Mr. Segall, I don't have any direct knowledge of that.

Q. Well, let me ask you to – see if you remember that both [56] in connection with the Poison Control Center and EMS Education Fund, that that money came through Public Health prior to 1999; do you recall that?

A. Mr. Segall, only in very general terms.

Q. Okay. All right. That's fine.

Do I understand, Ms. Herring, that it's your testimony that Dr. Bobo's idea for calling Dr. Sorenson was that if he could get Capstone to withdraw from AHN, the other bidder in District 4, and get Capstone instead to join NHS's network, that AHN would be unable to compete; is that correct?

A. Yes, sir.

Q. So, what I – do I understand that what Dr. Bobo wanted was to get somebody to ask Sorensen to get Capstone to withdraw from AHN so AHN wouldn't bid; right?

A. That's correct.

Q. It is likely, Ms. Herring, that you actually asked Nick Bailey to ask the governor to speak to Sorensen as opposed to you asking the governor directly? Do you think that's actually what happened, that you asked Nick Bailey to ask the governor?

A. I had a conversation with Nick, but I had a conversation with the governor as well.

Q. You had a conversation –

A. – I had a conversation with Nick, but I also had a – in general terms, a conversation with the governor as well.

[57] Q. Very general terms, just as –

A. – as I – as I've laid out here earlier today.

THE COURT: Well, let me just ask you this: Were Governor Siegelman and Dr. Bobo pretty close, so far as you knew?

THE WITNESS: Well, Judge, I don't know that I can really answer that question.

I can say this: Phillip, as Mr. Segall pointed out earlier, had a very, very aggressive personality and felt very comfortable picking up the phone and calling anybody at all hours of the day and night.

THE COURT: All right.

THE WITNESS: They had a political relationship, I know that.

THE COURT: Yes. Do you have any reason to doubt that Dr. Bobo would have some reservations about picking up the phone and calling Governor Siegelman at any time about anything?

THE WITNESS: No, sir.

BY MR. SEGALL:

Q. He wouldn't get you to do that if he wanted to do that, would he –

A. Pardon me?

Q. He wouldn't need you to do that if he wanted to do it, would he?

[58] A. That's correct.

Q. I believe you've testified that there was litigation threatened in – with respect to this District 4 –

A. Yes, sir.

Q. – while all this was going on; is that correct?

A. Yes sir. That's correct.

Q. All right. Now, you've testified that what Bobo wanted was for Sorensen or somebody to ask Sorensen to get Capstone to withdraw from AHN so AHN wouldn't bid.

And my question to you is, if all – anybody in the governor's – well, first of all, you don't know that the governor ever spoke to Sorensen about this at all, do you?

A. I know that the governor told me that he had spoken to Dr. Sorensen, but no, sir.

Q. All right. By the way, Dr. Sorensen, I believe I read, is somebody who – whose reputation you'd believe to be a good one for truth and honesty; is that correct?

A. Yes, sir. That's correct.

Q. You would believe Dr. Sorensen under oath, would you not?

A. Yes, sir.

Q. If, in fact, if all anyone who worked in the governor's office did, including the governor, is asked Dr. Sorensen not to talk Capstone in withdrawing from AHN, if the only thing they asked him to do was to mediate or conciliate a dispute that was going on in District 4, that would not be what Dr. [59] Bobo wanted, would it?

A. I'm sorry, Mr. Segall, could you ask that question again, please, sir?

THE COURT: I didn't understand it either.

THE WITNESS: I'm sorry.

MR. SEGALL: Let me try again, Judge.

Q. The background is, you've already testified that Dr. Bobo wanted someone to talk to Sorensen so that Sorensen would convince Capstone – Capstone was a part of the other bidder; right?

A. That's correct.

Q. Of AHN, Alabama Health Network; correct?

A. Yes, sir. That's correct.

Q. And Alabama Health Network had a network to provide its services; correct?

A. That's correct.

Q. And Capstone was a critical part of that network; correct?

A. Yes, sir. That's correct.

Q. What Bobo wanted was for somebody to talk to Dr. Sorensen and get Sorensen to convince Capstone to withdraw from the AHN network and join the Neighborhood Health Service Network; correct?

A. Yes, sir. That's correct.

Q. And my question to you is if that's what Bobo wanted –

[60] MR. HART: I – I can't see the witness –

Q. – if that's what Bobo wanted, if what he wanted was Capstone to withdraw from AHN, as you have testified a couple of times now – my question to you is, if the only thing anybody asked Sorensen to do was to please mediate a dispute in District 4 so we don't get bogged down in a bunch of litigation, that would not be what Bobo was asking for; would it?

A. That's correct.

Q. Okay. And especially if nobody in the governor's office ever suggested to Dr. Sorensen how the mediation or the conciliation should come out, who should end up with the bid; that would be very different than what Dr. Bobo wanted, would it not?

A. That's correct.

Q. I'm going to show you what has been marked – I'm going to show you what's been marked as Siegelman Exhibit 12A, and just ask you to review it.

A. (Complying.)

MR. SEGALL: And, Your Honor, let me say that we have a certified copy of this –

THE COURT: All right.

MR. SEGALL: – to authenticate it, we have a certification.

THE COURT: All right.

[61] Q. Please read that statement to yourself.

A. (Complying.)

Q. Ms. Herring, do you agree with me that what is –

MR. HART: Objection. Objection. She didn't say she recognized the document.

MR. SEGALL: We offer the document as a certified – we have a certified copy, Your Honor.

THE COURT: Is there any doubt as to the authenticity of the document?

MR. SEGALL: It was produced to us by the government.

MR. HART: We're not objecting to the authenticity. If this witness has no knowledge of this document, he's asking an opinion about something she may have never seen. I haven't heard her say she's aware of what it even is –

THE COURT: All right. Siegelman Exhibit 12A is received in evidence.

Have you seen this document before?

THE WITNESS: No, sir.

THE COURT: All right. Then you may not ask her about it.

MR. SEGALL: Can I – Your Honor –

THE COURT: It's in evidence, but you may not ask her.

MR. SEGALL: Right. Right. Can I take a shot at a [62] question, Judge, and you tell me if it's bad?

THE COURT: You can count on it.

MR. SEGALL: I'm sure of that.

Q. My question is, if all anybody who worked in the governor's office asked Dr. Sorensen to do is what is set out in this letter, do you agree that what Sorensen was asked to do was not what Bobo wanted? Do you agree with that?

MR. HART: Objection. Objection, Your Honor. What Sorensen was asked to do, is that from this document, is that what he's saying?

MR. SEGALL: Yes. Yes. That's what I'm saying.

MR. HART: I object. She says she's never seen that document, and he's asking an opinion, her opinion, is it okay to do what's in this document that she's never seen. It's objectionable.

THE COURT: All right. All right. I heard your objection. I overrule the – have you now read the document?

THE WITNESS: Yes sir, I read it.

THE COURT: Is it consistent with what you understood to be Dr. Bobo's objective?

THE WITNESS: No, sir.

THE COURT: All right.

BY MR. SEGALL:

Q. So do you agree, then, that if all anybody who works in the governor's office did is asked Sorensen if he would [63] mediate a dispute – if that's all either Mr. Hamrick did or Governor Siegelman did, they didn't help Bobo in that regard, did they?

A. They did not do what Phillip had asked me to ask them to do.

Q. All right. Do you agree, Ms. Herring, that the Maternity Care Program was a critically important program that needed to be implemented quickly?

A. Yes, sir.

Q. Do you know, in fact, that the State's – the Maternity Care Program was a Medicaid program; correct?

A. That's correct.

Q. So that – to provide medical care to mothers and infants and to the –

THE COURT: Mr. Segall, was this matter gone into on the direct examination of the witness?

MR. SEGALL: This is – relates to Dr. Sorensen, Your Honor.

THE COURT: I was asking about Dr. Sorensen.

MR. SEGALL: Okay. Well, this is my question.

Q. Do you agree, considering what doctor – that Dr. Sorensen was asked to mediate or conciliate, if he was, do you agree that the state could not afford to become bogged down in a lawsuit –

MR. HART: Objection, Your Honor.

[64] Q. – no matter whether it was filed by NHS or AHN?

THE COURT: The objection is sustained.

BY MR. SEGALL:

Q. All right. Let me just ask you a few questions about this movement of money. Okay?

As I understand your testimony, you do not know of your own knowledge that the governor ever in fact did anything to move any money; you don't know that of your own knowledge, do you?

A. I only know that the governor acknowledged the money had been moved.

Q. Yes, ma'am. He acknowledged to you after the fact –

THE COURT: Well –

Q. – after –

THE COURT: Mr. Segall, I understand the witness' testimony. This witness has no personal knowledge –

MR. SEGALL: Okay.

THE COURT: – that the governor had any role in the movement of the money.

MR. SEGALL: All right.

Q. Your testimony to the grand jury, Ms. Herring, was that the money that you say was moved into the Fire College budget for Dr. Bobo actually ended up in the hands of the Fire College and was spent at the direction of Senator Poole; correct?

[65] A. To the best of my knowledge, yes, sir.

Q. And you testified to that repeatedly in the grand jury?

A. Yes, sir.

Q. Correct? That that was the money; correct?

A. Yes, sir.

THE COURT: And that's how discretionary money is generally spent in a district when that money is considered to be for the pork?

THE WITNESS: Yes, sir. That hasn't changed since you left. It's still the same.

BY MR. SEGALL:

Q. My question is, you're not aware, other than that money that – that discretionary money that actually went to the Fire College and was spent in Senator Poole's district at his direction – other than that money, you're not aware of any other money in the Fire College budget allegedly for Dr. Bobo's use; correct?

A. That's correct.

Q. All right. Now, let me ask you this, Ms. Herring: If the prosecution in this case has conceded in open court that the $550,000 Senator Poole said he put into the Fire College budget and that you testified was in fact spent in Senator Poole's district at its direction – if the prosecution has conceded that, that that money was never intended for Dr. Bobo – if they have conceded that it was never intended for [66] his use, then you would not be aware of any money at all that went to the Fire College intended for Dr. Bobo's use in connection with the Maternity Care Program; is that correct?

MR. HART: Objection. I don't understand that question, your honor.

MR. SEGALL: Let me try it again, Your Honor.

MR. HART: I just don't understand it. And I think –

THE COURT: Hold on. Are you aware of two or more appropriations of $550,000 in discretionary funds to the Fire College in 1999?

THE WITNESS: I'm sorry, Judge?

THE COURT: Are you aware of two separate appropriations of $550,000 in discretionary funds allocated to the Fire College in 1999?

THE WITNESS: No, sir.

BY MR. SEGALL:

Q. Do you agree with me if the $550,000 that – that you always understood to be Phil Poole's discretionary money and that, in fact, was spent at his direction in his district –

MR. HART: Objection –

Q. – if that money was in fact – if that money in fact was not put into the budget for Dr. Bobo's use, is it fair to say you're not aware of any money that was put in the budget allegedly for Dr. Bobo's use?

[67] MR. HART: Objection –

Q. – is that fair to say?

MR. HART: Objection.

THE COURT: Overruled.

MR. HART: Misstates her testimony, Your Honor. You understand the question?

A. I don't – where are we? Am I supposed to answer you now?

Q. You can answer the question.

A. Okay. The only thing that I'm aware of, Bobby, is that it was Dr. Bobo's intention for the money to go to the Fire College to be spent the way Dr. Bobo intended for it to be spent.

Q. That's not – please listen to my question.

MR. HART: I can't see the witness.

Q. You've testified – you have testified that – numerous times you've testified that the money that was put into the Fire College budget for Dr. Bobo's use was that same very 500 some odd thousand dollars that Phil Poole claimed to be his money; correct?

A. Yes, sir.

Q. And actually went to the Fire College and was spent at the direction of Senator Poole; correct?

A. That's correct.

Q. And I'm saying – I ask you to assume for the moment, [68] just for the moment, that that money was not put into the Fire College budget for Dr. Bobo, that you were just mistaken, it was not put there for Dr. Bobo – my question is, if that money was not in fact put there for Dr. Bobo, am I correct that you are not aware of any money that was in the budget for Dr. Bobo? If that's not it, you don't know of any other money; correct?

A. That's correct.

Q. Thank you. And – and if neither the governor of Alabama or Mr. Hamrick had anything – never did anything to put any money in the Fire College budget, that it's obvious, isn't it, that they never agreed to put any money in the Fire College budget? If they didn't do it, it's obvious they never agreed –

MR. HART: Objection.

Q. – is that correct?

MR. HART: Objection.

THE COURT: It's sustained. It's argumentative. Is that it, Mr. Segall? Any other questions?

MR. SEGALL: Let me just see real quick, Judge.

Q. Let me ask this very quickly: Isn't it true – you testified to something about Senator Poole was supposed to claim some money.

My question to you is, didn't Senator Poole – didn't you hear Senator Poole say that was his money in the budget [69] before you ever heard anybody say that Poole was going to be some cover man?

A. No, sir, I didn't hear that prior to Dr. Bobo having that discussion with me.

Q. You sure you didn't testify to that at the grand jury; that you, in fact, heard Poole say that was his money, before – before Bobo ever said a word to you?

A. You'll have to refresh my memory about that. I thought I had an initial conversation with Dr. Bobo before that period.

Q. I – I'll find that in just a moment. I believe this is the same year as the walkout?

A. Yes.

Q. And you were, in fact, encouraging the Senators – Senator Poole was one of the fellows who walked out?

A. Yes.

Q. Democratic caucus walked out?

A. Who I was employed by at the time.

Q. You were working for the Democratic caucus?

A. Yes, sir. That's correct.

Q. You were encouraging those folks to get discretionary money if they can – if they could so they wouldn't look like complete idiots to the folks back home?

A. That is absolutely correct.

Q. And not only were you encouraging them to get discretionary money, you were saying to them: When you get [70] it, tell folks about it, tell them you got it; right?

A. Yes, sir.

Q. And you know that Senator Poole was telling everybody in sight that he had discretionary money; right?

A. Yes, sir.

Q. Now, how bad – and he was saying it was volunteer fire departments, you remember that?

A. Yes, sir.

Q. He'd given money to volunteer fire departments in the preceding year – previously he had done that; correct?

A. Yes, sir.

Q. All right. Do you agree with me that it would be political suicide for a fellow to go around saying to all his constituents, "I got money for you for this purpose", and then not deliver the money? That'd be political suicide, wouldn't it?

A. Yes, sir.

Q. And Senator Poole ain't somebody who's ever been prone to that kind of behavior, is he?

A. No, sir.

MR. SEGALL: Thank you, ma'am.

THE COURT: Let's take a recess. We'll be in recess until 11 o'clock.

(Recess at 10:40 a.m. until 11:40 a.m.)

[71] THE COURT: Cross-examination by Defendant Hamrick?

MR. WISE: No questions, Your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. HART:

Q. Ms. Herring, you were asked by the defendant where you first heard of this money that was being moved into the Fire College fund was going to be Senator Poole's discretionary funds?

A. Yes, sir, that's correct. Can you hear me?

Q. And I believe your answer was you heard it from – what is your answer?

A. My answer is the first time that I was aware that a plan like this existed, I was told about it from Dr. Bobo.

Q. Okay. Did you ever have a conversation about that with the Defendant Hamrick?

MR. WISE: Your Honor, I object. That is not proper questioning on redirect.

THE COURT: Overruled.

A. I'm sorry?

BY MR. HART:

Q. Did you ever have a conversation about that with Defendant Hamrick?

A. Yes. I explained to Defendant Hamrick, to Paul that that was Phillip's plan as to how that once the money was moved, [72] it would be considered Senator Poole's discretionary money.

THE COURT: Well, that's the response that you intended?

MR. HART: That's not the one I intended, Your Honor. I'm hearing some different ones, and I want to go back and try to sort it out.

BY MR. HART:

Q. Do you remember being interviewed by the Attorney General's Office on April 19th of this year by Gerald Shockley and others?

A. Yes, sir.

Q. Do you remember telling Mr. Shockley that the first conversation that you recall having about the money being designated specifically to Senator Poole's pork was with Paul?

A. The first time I had with anybody else besides Phillip.

Q. So that's your testimony. You talked to Phillip and then to Paul?

A. Yes, sir, because it was Phillip's plan.

Q. Okay. Now, to your knowledge, was Senator Poole ever told that this money that ended up, that he ended up spending as you went into with the defense, was not intended to be – was he ever told this was not intended to be his pork money? Even though he ended up spending it that way, did he ever have any idea that it was actually intended for –

[73] THE COURT: The objection is sustained.

MR. HART: Can I know what the objection is, Your Honor?

THE COURT: If you can't figure it out –

MR. HART: I can't figure it out. So I would like it for the record.

THE COURT: Next question.

BY MR. HART:

Q. Did Paul tell you that he had talked to Senator Poole about the money?

MR. WISE: Object to leading.

THE COURT: It's sustained.

MR. HART: Your Honor, the defendant is a co-conspirator. That's what we're alleging, and that is what this hearing is about.

THE COURT: I sustained the objection, Mr. Hart. Go to your next question.

MR. HART: Your Honor, I would like to ask questions about statements made by the Defendant Hamrick.

THE COURT: I have sustained the objection to your question, Mr. Hart. Go to your next question if you have one. Otherwise, this witness –

MR. HART: Your Honor, I honestly did not understand what the grounds were to the objection. Is it hearsay?

THE COURT: Mr. Hart, I'm not here teaching a class [74] in evidence.

MR. HART: I understand, Your Honor.

THE COURT: Now, do you have another question of this witness?

MR. HART: Yes, sir, I do.

BY MR. HART:

Q. Ms. Herring, you have testified that Defendant Siegelman, after you had explained the plan to him to the extent that you explained it as you've testified to today, called you back; is that correct?

MR. SEGALL: Object to that, Your Honor. It mischaracterizes her testimony.

THE COURT: Sustained.

BY MR. HART:

Q. Did Defendant Siegelman call you back after you explained the plan to him?

MR. SEGALL: Object to leading, Your Honor.

THE COURT: Sustained.

BY MR. HART:

Q. Did you have any conversation with Defendant Siegelman after your initial conversation with him where you informed him of what the plan was?

A. Yes, sir.

Q. What was that conversation? What did he say?

THE COURT: Is this going to be something that you [75] haven't testified to already?

THE WITNESS: No, sir.

MR. SEGALL: Objection.

THE COURT: Sustained.

THE WITNESS: Judge, I don't feel comfortable answering that question.

THE COURT: You say –

THE WITNESS: I don't feel comfortable answering your question.

THE COURT: You were going to tell us something you haven't told us before?

THE WITNESS: No, sir, not that I'm aware of.

THE COURT: All right. You may proceed.

MR. HART: I think you told her to answer the question.

THE COURT: You may answer the question.

A. Would you ask it again Matt, please?

BY MR. HART:

Q. After your first conversation with Defendant Siegelman wherein you told him of the plan, moving money to the Fire College and so forth, did you have any other conversation with him? And I think you answered yes. And the question now is: What did he say?

A. He acknowledged at that juncture that the money had been moved, and then that was that conversation.

[76] THE COURT: You may continue.

A. In a subsequent conversation, he also acknowledged that a call had been made to Dr. Sorensen.

BY MR. HART:

Q. Now, you say that he acknowledged that the money had been moved. Did he indicate that he had done anything?

THE COURT: The objection is sustained.

MR. HART: Judge, not to go into law school again, but what is the basis of the objection, if I may?

THE COURT: Leading.

MR. HART: I don't think the question suggested an answer, Your Honor. She's answered no to numerous questions. The answer could be no.

THE COURT: Mr. Hart, I've made my ruling.

MR. HART: Very well, Your Honor.

BY MR. HART:

Q. Did Defendant Siegelman make any phone calls to get the money?

MR. SEGALL: I object.

THE COURT: Did he make any phone calls?

MR. HART: If she has knowledge of that, she can testify to it; and it's not leading.

THE COURT: Do you have any personal knowledge of the Defendant Siegelman making some phone calls?

A. No, sir.

[77] THE COURT: All right.

BY MR. HART:

Q. Do you remember testifying before the Grand Jury on April 2nd, 2004?

A. Yes, sir.

Q. And do you remember being asked –

MR. SEGALL: What page was it?

MR. HART: Page 28.

BY MR. HART:

Q. And do you remember being asked the question: "Well, I think it's your testimony last time and the governor, you had a phone conversation with the governor, amongst others, actually where he told you that that had been effected?" That was the question. I think you understand the context; and if you don't, I'll go back further.

MR. SEGALL: Your Honor, I object to this because if he asked her something that would be hearsay in court, he's not entitled to impeach her on it now.

THE COURT: The objection is sustained.

MR. HART: It's not hearsay, Judge. She answered she had direct knowledge.

THE COURT: Well, it was a leading question.

MR. HART: No, Your Honor. It was impeachment.

THE COURT: Read me the question that you asked her in the Grand Jury.

[78] MR. HART: "Well, I think that's your testimony last time when the governor – you had a phone conversation with the governor, amongst others, actually where he told you that that had been effected."

THE COURT: Sustained.

MR. HART: Judge, leading –

THE COURT: Mr. Hart, do you have another question for this witness?

MR. HART: Your Honor, I would like to put on the record, if I could, that leading in the Grand Jury are permissible; and just because they're leading in Grand Jury doesn't mean I can't impeach this witness with that question, the answer to –

THE COURT: Well, maybe you know of some other person who makes the ruling in this courtroom other than I. I say that you don't ask that question.

MR. HART: Very well then, Your Honor. Then I feel like I should inform the Court, because the witness is testifying differently –

THE COURT: You may make, Mr. Hart, as you should know, an offer of proof.

MR. HART: I'll make an offer of proof, Judge, that at the Grand Jury on April 2nd, 2004, this witness testified that the governor had told her words to the effect that the governor made the phone call to get the money moved. The [79] money got moved. The governor himself couldn't move the money, but the governor made the phone call to get the money moved.

MR. SEGALL: I object to that, Your Honor. Nowhere in there does it say –

MR. HART: We can read it into the record, Your Honor.

THE COURT: As part of the offer of proof, put the document into evidence.

MR. HART: Can I read it in the record, Judge?

THE COURT: Put it into evidence physically.

MR. HART: Very well, Your Honor. I'll get a clean copy to do that with.

MR. GIBBS: Can we introduce that and then substitute a clean copy?

THE COURT: Yes.

MR. HART: I'll get a clean copy of that, Judge. I don't have any further questions, Your Honor.

THE COURT: All right.

MR. HART: And I'll get a clean copy and put that in as Government's I.

MR. SEGALL: No questions, Your Honor.

MR. WISE: None, Your Honor.

THE COURT: Thank you, Ms. Herring. The government will call its next witness.

[80] MR. HART: Nick Bailey, Your Honor.

WITNESS SWORN.

THE CLERK: Would you state your name for the record, please.

THE WITNESS: My name is Nick Bailey.

THE CLERK: Spell your last name.

THE WITNESS: B-a-i-l-e-y.

THE CLERK: The city and state where you live.

THE WITNESS: Birmingham, Alabama.

NICK BAILEY, GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. HART:

Q. Good morning, Mr. Bailey.

A. Good morning.

Q. Mr. Bailey, what do you do?

A. I work for a local commercial real estate developer here in Tuscaloosa.

Q. I'm going to ask you to pull the microphone a little closer or speak up a little bit more. We've got pretty bad acoustics.

You work for a developer here in Tuscaloosa?

A. Yes, sir.

Q. Do you know Defendant Siegelman?

A. Sir?

Q. Do you know the Defendant Siegelman?

[81] A. Yes, sir.

Q. How do you know him?

A. I've known and worked for him since late 1993.

Q. And when did you meet him?

A. December, 1993.

Q. And when did you begin – you said you worked for him. When did you go to work the first time for Defendant Siegelman?

A. Early 1994.

Q. And in what capacity did you work for the defendant?

A. As a campaign assistant.

Q. Okay. And what campaign was that?

A. His campaign for lieutenant governor.

Q. And he won that election; is that correct?

A. That's correct.

Q. After that, did you continue to work for, at that time, Lieutenant Governor Siegelman?

A. Yes, sir.

Q. In what capacity did you work for the defendant when he was lieutenant governor?

A. In an administrative capacity.

Q. What does that mean? What did you do?

A. Handled administrative duties in his office, at the Lieutenant Governor's Office.

Q. Was that a full-time position?

[82] A. It was.

Q. And did you know – do you know Defendant Hamrick?

A. Yes, sir.

Q. How do you know Defendant Hamrick?

A. Paul began working for Don in early 1994 as well, and I've known him since then.

Q. And did he work in the Lieutenant Governor's Office when you did?

A. Yes, sir.

Q. What was his position?

A. Chief of staff, I believe.

Q. Does chief of staff, is that the top employee for the lieutenant governor?

A. Yes.

Q. Head honcho more or less?

A. Top position.

Q. And do you know Amy Herring?

A. Yes, sir.

Q. How do you know Amy Herring?

A. Amy also began working the campaign in 1994.

Q. And after the Defendant Siegelman was elected to lieutenant governor, did she work with him?

A. Yes.

Q. Did you work with her?

A. Yes.

[83] Q. After Defendant Siegelman left the lieutenant governor's office, do you recall when that was?

A. When he left the lieutenant governor's office?

Q. Yes.

A. Early 1999.

Q. Okay. And do you know why he left?

A. To become governor.

Q. Okay. And so he was elected governor?

A. That's correct.

Q. After he became the governor for the state, did you work for the Defendant Siegelman when he was the governor?

A. Yes, sir.

Q. And what was your position or positions when you worked for Defendant Siegelman while he was governor?

A. Similar to my duties when he was lieutenant governor.

Q. Do you remember what your titles were?

A. Ranging from budget officer to assistant director to executive secretary.

Q. Do you remember what order you served in in those positions?

A. No, not necessarily.

Q. You don't recall?

A. Well, I started out as executive secretary, budget officer, assistant director, and then back to administrative assistant toward the end.

[84] Q. Did Defendant Hamrick, to your knowledge, work for the governor during that period of time as well?

A. Yes, sir.

Q. What was his position?

A. Chief of staff.

Q. In relation to the chief of staff, where did you fall in the chain of command so to speak? Were you a peer?

THE COURT: I don't really need to know all of this for purposes of this hearing.

MR. HART: Your Honor, I think it goes to what I'm trying to get to, if I could offer that –

THE COURT: Well, I'll get right to it.

MR. HART: – is the relationship of this witness to the defendants, and it goes to the credibility.

THE COURT: All right. Mr. Bailey, do you have any knowledge that either the Defendant Siegelman or the Defendant Hamrick knowingly became members of a conspiracy, an unlawful conspiracy of any kind?

MR. HART: I would object to the Court's question, Your Honor.

THE COURT: It's overruled.

THE WITNESS: No, sir.

THE COURT: Tell me what you know about Dr. Bobo and the appropriate of $550,000 to the State Fire College's budget by the legislature and the Defendant Siegelman and [85] Hamrick.

THE WITNESS: It was common knowledge in our office that we were attempting to assist Dr. Bobo with his request to – with funding for the Fire College.

THE COURT: And you know that Dr. Bobo had made a request of the governor for assistance in funding the Fire College?

THE WITNESS: Yes, sir.

THE COURT: And what was that request?

THE WITNESS: I believe it was in the amount of 500 or 550 thousand.

THE COURT: And did Dr. Bobo indicate the purpose in which that amount was sought?

THE WITNESS: No.

THE COURT: What was your understanding of how Dr. Bobo planned to use this appropriation?

THE WITNESS: He wanted to use it in his negotiations with the University of Alabama.

THE COURT: Did he tell you anything more specific than that?

THE WITNESS: That he wanted to – he was helping the Fire College with funding so that he could better negotiate the University of Alabama.

THE COURT: All right. Mr. Hart.

MR. HART: Your Honor, for the record, I would [86] object to the question getting the defendant to characterize whether or not something else was unlawful or not and asking him to testify as to that.

BY MR. HART:

Q. Mr. Bailey, I think you just answered the judge's question that Dr. Bobo didn't get any more specific about the purpose of that money other than it was to be used in his negotiations with his competitor. Did anyone else tell you more specifically what the purpose of that money was?

A. No. He said he wanted to use it in his negotiations with the university and the competitive bidder.

Q. Did you ever have any conversation with Amy Herring?

A. No.

Q. Was there anything else other than – to your knowledge, did Governor Siegelman do anything, make a phone call or anything else to effect the movement of this money to the Fire College?

A. I know he spoke to Dr. Sorensen about it. I don't know beyond that.

Q. How do you know that he spoke with Dr. Sorensen about it?

A. I was present when Dr. Sorensen called the governor's office.

Q. You were in the governor's office.

A. At the State House.

Q. And Dr. Sorensen called?

[87] A. Yes, sir.

Q. Who was with you when he called?

A. Paul was there. The governor was there. Marilyn Rowe was there; and I believe there was one other person, possibly Danny Hester.

Q. Who took the phone call?

A. The governor initially took the phone call.

MR. J. ESPY: Your Honor, I hate to interrupt. But in view of what he just said, we've got somebody we want to leave the courtroom. We would ask Marilyn to

leave. Something came out that we'd never heard before. So we would immediately call it to the Court's attention and ask her to be removed.

THE COURT: All right.

BY MR. HART:

Q. You said these people were in the room, and this phone call came from Dr. Sorensen. Who picked the phone up?

A. The governor did.

Q. And how do you know and how did you know at the time that it was Dr. Sorensen calling?

A. Marilyn told the governor that Dr. Sorensen was on the line.

Q. When you say a phone call came in, Marilyn actually answered the phone call first?

A. Yes, sir.

[88] Q. She took the phone call?

A. Yes, sir.

Q. And then informed him. She's his assistant or some –

A. Yes, sir.

Q. And told him that Dr. Sorensen was calling?

A. Right.

Q. After Marilyn said that, was there any conversation with the Defendant Siegelman and Hamrick and yourselves as to the purpose of that phone call?

A. Paul told the governor that Dr. Sorensen was calling regarding the Fire College funding.

Q. And what did he say?

A. That Dr. Sorensen was calling regarding the Fire College funding.

Q. What did Defendant Siegelman say?

A. He took the call from Dr. Sorensen and talked to him briefly and told him that he hoped things would work out between he and Dr. Bobo in their discussions and asked if he could talk to Paul, and David handed the phone to Paul. And Paul talked to Dr. Sorensen, and we left shortly after that.

Q. When you say that Paul told the governor that Sorensen was calling about the Fire College money, did Dr. Bobo's name come up in any way?

MR. J. ESPY: Your Honor, we object to continuously leading the witness.

[89] THE COURT: The objection is sustained.

MR. HART: It did or did not come up, Judge. The answer could easily be no.

BY MR. HART:

Q. Did Defendant Hamrick say anything else about the money and who it was for, if anyone, and why Dr. Sorensen would be interested in that?

MR. WISE: Object, Your Honor. That's about four different questions.

THE COURT: Sustained.

BY MR. HART:

Q. Did Defendant Hamrick say anything else about that money?

A. Not to the governor before the call, no, sir.

Q. Did he say anything else to you?

A. No.

Q. When the governor got on the phone with Dr. Sorensen, what did he say?

MR. J. ESPY: Asked and answered, repetitive. Object.

THE COURT: Sustained.

BY MR. HART:

Q. Did Dr. Sorensen talk with anyone other than the Governor in your presence?

A. Yes, sir. He spoke to Paul.

Q. What did Paul say?

[90] A. Told him he checked on the funding for the Fire College and told him it had been taken care of or would be.

Q. Did he say anything else?

A. Not while we were there, but we left before the call was over.

Q. Do you have any knowledge as to why Dr. Sorensen would care about money going to the Fire College?

MR. J. ESPY: Object. Only as to personal knowledge, Your Honor.

MR. HART: That's what I'm asking him.

THE COURT: The objection is sustained.

BY MR. HART:

Q. Do you have any personal knowledge about why Dr. Sorensen would be calling the governor's office where you worked as an assistant to the governor asking about money going to the Fire College?

MR. WISE: Objection.

THE COURT: The question and the answer to that question will not be helpful to me in determining the facts that I need to find for the purposes of this hearing. So next question.

BY MR. HART:

Q. Did Defendant Hamrick tell the governor that Dr. Bobo wanted the money moved?

MR. WISE: Objection, leading.

[91] THE COURT: Objection is sustained.

BY MR. HART:

Q. Do you recall anything else about that conversation? Was anything else said by Defendant Hamrick?

A. I think that's it.

Q. Do you remember being interviewed on April 19, 2004?

MR. J. ESPY: I'm sorry. What date?

MR. HART: April 19th, '04.

MR. J. ESPY: May I approach?

THE COURT: Yes, sir.

MR. J. ESPY: They stood up in this courtroom this morning and said they had given us Jencks material. We have never been given that. On September the 3rd, we filed a Motion to Compel. That was the subject of a hearing on September 10th. Mr. Gibbs got up and certainly implied that hearing – we asked for all of this witness' statements, Your Honor, in our motion. They submitted in-camera to June and July. We have never seen this statement. We asked for all statements in our motion; and I certainly say that I don't know exactly what was said, but the gist of what I understood John to say, this is everything we've got related to this case.

MR. GIBBS: I remember what I said Your Honor.

MR. J. ESPY: Let me finish. The other thing is he stood up earlier and said he'd given us all the Jencks Act. [92] This lady right here walked over here and said here's all the Jencks Act to the witnesses who will testify today in the trial. And we don't have it, Judge.

MR. HART: This isn't Jencks, Your Honor. It's not recorded. He's not a defendant.

MR. J. ESPY: But it's a statement taken simultaneously –

MR. HART: It's a 302.

MR. J. ESPY: A 302 is a statement taken of this witness, exactly what they have been producing to us –

THE COURT: It's a 302?

MR. J. ESPY: Yes, sir, and they didn't give it to us.

THE COURT: All right. So it's not a statement of this witness?

MR. HART: That's right, Your Honor.

THE COURT: So the objection is sustained. I sustain the objection.

MR. HART: I want to refresh his memory with it.

THE COURT: You are going to refresh his memory with a statement he didn't write?

MR. J. ESPY: Which they say we can't have under Jencks, Your Honor.

MR. HART: Your Honor, for the record, it's not Jencks material.

[93] THE COURT: For the record, you can put the 302 in evidence for purposes of this motion and go to the next question you have of this witness.

MR. HART: Very well, Your Honor. I'll have a clean copy marked and have it put in.

Nothing further for this witness, Your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. J. ESPY:

Q. May it please the Court. Mr. Bailey, let me first see if we can determine when the Andrew Sorensen call was made. Can you give the Court a time frame for that?

A. I believe it was in May of '99.

Q. In May of 1999?

A. I believe that's correct.

Q. Did you ever make a telephone call to Dr. Andrew Sorensen?

A. No, sir, not that I recall.

Q. Have you ever had any substantive discussions with Dr. Andrew Sorensen about anything?

A. Nothing other than Alabama football.

Q. So it would be fair to say that it's your recollection and your testimony that you have never talked with Dr. Sorensen at any point about these matters before this Court today?

[94] A. That's correct.

Q. And would it be fair to say, as I understood your earlier testimony, that you have never talked with Amy Herring at any time about the matters before this Court?

A. That's correct.

Q. The recollection you have of the Sorensen telephone call is that a call came in from Dr. Sorensen to the governor's office; is that correct?

A. That's correct.

Q. And your recollection is that those present were yourself, Governor Siegelman, Paul Hamrick, Marilyn Rowe, Governor Siegelman's executive secretary, and Danny Hester?

A. I'm not positive about Danny Hester, but there was another person there.

Q. Somebody there for some reason that sticks in your mind that was Danny?

A. Yes, sir.

Q. What was Danny's position in the state government?

A. Governor's executive security.

MR. JOE ESPY: Your Honor, may I approach?

THE COURT: Yes, sir.

BY MR. ESPY:

Q. Mr. Bailey, let me ask you to look at Exhibit 12A. It's a two-page letter from Paul Skidmore, to the University of Alabama President Andrew Sorensen. Take a look at that [95] letter. And when you've read it, Mr. Bailey, if you'll let me know you have read it. Have you read it?

A. Yes, sir.

Q. It doesn't say anything about any Fire College, does it?

MR. HART: Objection, Your Honor.

THE COURT: I sustain the objection.

BY MR. J. ESPY:

Q. Had you seen that document before?

A. No.

Q. Are you aware that that document was issued after the telephone call –

THE COURT: Objection sustained.

MR. HART: Objection. He's not seen it, Judge; and it's clear. We've been through this.

MR. J. ESPY: I'm asking the time frame.

THE COURT: I have sustained the objection.

MR. J. ESPY: I'll move on. I'm sorry.

BY MR. J. ESPY:

Q. As I understand it, Governor Siegelman had some pleasantries with Dr. Sorensen; is that correct?

A. Yes, sir.

MR. HART: Objection, Your Honor. I don't believe that was his testimony.

THE COURT: Overruled.

MR. HART: No testimony as to pleasantries.

[96] THE COURT: Overruled.

MR. J. ESPY: I'm sorry. The judge overruled the answer to the question.

A. He exchanged greetings with Dr. Sorensen.

BY MR. J. ESPY:

Q. Nothing of any substance?

A. Went on to say that he encouraged Dr. Sorensen to work through the issues with Dr. Bobo.

Q. Anything else?

A. No.

Q. And then, as I understand it, wasn't Governor Siegelman late for a meeting, and you and he had to leave?

A. We left shortly after that, yes, sir.

Q. And was the conversation still going on when you left?

A. That's right, with Paul.

Q. Your duties with the governor had nothing to do with the legislature; isn't that correct?

A. That's correct.

Q. You weren't involved in lobbying the legislature?

A. No.

Q. You weren't involved in any movement of $550,000?

A. No.

Q. You have no knowledge that the governor was involved in the moving of $550,000?

A. I don't understand movement.

[97] Q. I'm just saying – I'm using the government's terms, Mr. Bailey. In fact, the governor can't move $550,000 in the legislature, can he?

A. I believe that's correct. I can't say for sure.

Q. I'm asking you, are you aware of Governor Siegelman moving any money from the education budget to the Fire College?

A. No.

MR. J. ESPY: I have no further questions.

THE COURT: Okay.

MR. WISE: It would be repetitious, Your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. HART:

Q. Mr. Bailey, how long did you work for Defendant Siegelman when he was governor?

A. Until December of '01, two and a half, close to three years.

Q. To your knowledge, can a governor, whether or not he has constitutional responsibility for the budget, can he use his position to move money?

THE COURT: Objection sustained. It's not helpful to me in any event.

MR. HART: Very well, Your Honor.

BY MR. HART:

[98] Q. To your knowledge, did the Defendant Siegelman or Defendant Hamrick ever make a phone call to anyone in the legislature about this Fire College money?

A. I'm not aware of any made.

MR. J. ESPY: Nothing further, Your Honor.

THE COURT: All right. Thank you, sir. Government call its next witness.

MR. GIBBS: Andrew Sorensen.

WITNESS SWORN.

THE CLERK: State your name for the record, please.

THE WITNESS: Andrew Aaron Sorenson.

THE CLERK: Spell your name. Andrew?

THE WITNESS: Aaron, A-a-r-o-n, Sorensen, S-o-r-e-n-s-e-n.

THE CLERK: The city and state where you live?

THE WITNESS: Columbia, South Carolina.

ANDREW AARON SORENSEN,
GOVERNMENT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. GIBBS:

Q. Dr. Sorensen, where are you employed?

A. Pardon?

Q. Where are you employed?

A. University of South Carolina.

Q. And what position do you hold?

A. President.

* * *

[136] Mr. Hart; and if you have some problem with it, I think a marshal can assist you.

MR. HART: May I ask a question, Your Honor?

THE COURT: Marshals, would you see to it that Mr. Hart takes a seat.

MR. HART: That won't be necessary, Judge, I can sit down.

THE COURT: Let's bring in the jury.

PROCEEDINGS CONCLUDED AT 2:30 P.M

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Patti L. Gass
/s/ Penny L. Enoch — 10/9/04
PENNY L. ENOCH — DATE
PATRICIA L. GASS